

# Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion

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*In this article, Professor Hunter questions the naturalness and inevitability of the dichotomy in constitutional law between freedom of expression and the right to equality. She places the origin of this doctrinal divergence in the history of American social protest movements in the first half of the twentieth century, which began with ideologically-based claims and shifted to a primary emphasis on identity-based equality claims. During the interim period between World War I and World War II, the wave of seminal First Amendment cases was ebbing and the wave of equality claims was beginning to swell. Close examination of the constitutional jurisprudence from that time reveals that the Court was groping toward the principle of anti-orthodoxy in expression law and the principle of anti-exclusion in equality law as mutually reinforcing concepts.*

*Professor Hunter proposes that constitutional jurisprudence reclaim the twin principles of anti-orthodoxy and inclusion. Using that lens, she re-examines the Supreme Court's ruling in a "hate speech" prosecution and the more general debate on issues of multiculturalism. She argues that a less dichotomized perspective shifts the valence of the expression/equality dichotomy so as to enable a richer understanding of the complexity and interconnectedness of both of these centrally important principles.*

## INTRODUCTION

Nearly fifty years ago, the Supreme Court ruled by one vote that a state could criminalize speech that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens . . . [or] exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy."<sup>1</sup> Such laws were advocated by equality proponents of the day.<sup>2</sup> Writing in dissent, Justice Black warned minority groups pleased by the ruling that it would boomerang, leaving them to contemplate the wisdom of the saying that "another such victory and I am undone."<sup>3</sup>

That was the beginning of the expression versus equality debate, and it shows no signs of going away. Today it seems as though it will be with us always.

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<sup>1</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).

<sup>2</sup> See generally David Riesman, *Democracy and Defamation: The Control of Group Libel*, 42 COLUM. L. REV. 727 (1942); Joseph Tanenhaus, *Group Libel*, 35 CORNELL L. Q. 261 (1950).

<sup>3</sup> *Beauharnais*, 343 U.S. at 275.

Although the Court's ruling in *Beauharnais* has never been explicitly overruled, it is no longer relied on as good law. Thus, the predictive rule in this debate appears easy: *Beauharnais* to the contrary notwithstanding, except on rare occasions, expression trumps. But a remarkably thin layer of reasoning underlies this semi-automatic result, and no coherent principle exists for explaining the exceptions. True, constitutional law is filled with platitudes of First Amendment fundamentalism, but most of those platitudes date from an era when equality was an underdeveloped realm of constitutional law. They predate equality's claims to a central and, indeed, fundamental role in a properly functioning democracy. Reviewing the vast literature of this debate, one is struck by a sense that it sounds very much like the First Amendment simply got there first.

This article questions the naturalness and inevitability of the doctrinal dichotomy between expression and equality. I locate the history of this divergence in the history of American social protest movements in the first half of the twentieth century, which began with ideologically-based claims and shifted to a primary emphasis on identity-based equality claims. I argue that the two strands have been far more imbricated than the neat doctrinal categories would suggest, and that, in fact, current doctrine now *misrepresents* the relationship between the two.

First Amendment jurisprudence has never fully comprehended the role that group identity dynamics played in the seminal case law protecting speech, but has rather treated those cases as emerging from disconnected, atomistic encounters between a repressive state and dissenting individuals. Group identity was critical, though, for two reasons: both because the speakers were targeted solely because of their group affiliation (loners who professed the same radical viewpoints usually were not targeted) and because identity characteristics such as ethnicity, religion and race permeated the speech cases, even if not acknowledged by the courts.

Equality law also has contributed to the misrepresentation. There, the focus is flipped, from the individual to characteristics of the group. Whereas in speech law we believe that all speakers should be protected, in equality law, courts must select which groups are entitled to heightened judicial review of laws that disadvantage them. This selection process privileges status—and static—characteristics. Equality law protects difference, not disagreement.

In this article, I suggest a new approach that focuses on neither the doctrinal categories nor the rhetoric associated with the expression versus equality debates, but on the underlying interests served by both the free expression and equality mandates: anti-orthodoxy and inclusion. If we begin our analysis there, the relationship between the two principles realigns in many instances and the conceptualization of the underlying tensions better serves the original goals of liberty and equality.

The article begins at the beginning of modern First Amendment law, with the World War I Era “clear and present danger” cases, and works forward to current First Amendment law, tracing the development of the dominance of individualist rationales for protecting expression. In the second section of Part I, I begin with today's

concepts of equality, centered on group characteristics, and work backward to an analysis of how the framework of protected groups became frozen in the law.

In Part II, I examine the point of convergence: a moment of overlap and hybridity in the expression-equality dynamic that lasted from roughly the end of World War I to the end of World War II. This was the period during which the wave of seminal First Amendment cases was ending and the wave of equality claims was beginning to swell. My starting point is footnote four in the *Carolene Products* case,<sup>4</sup> a footnote that has been read for many purposes, but never for its insights into the interplay between expression and equality. A close reading of its text against the social context of its time yields a much richer understanding of how the Court was groping toward the principle of anti-orthodoxy in expression law and the principle of anti-exclusion in equality law as mutually reinforcing concepts.

In the next two parts, I set forth the current legacy of those beginnings. In Part III, I examine the law of hate speech, the issue most frequently associated with the expression/equality debate and one where the conventional understanding that expression trumps equality is most fully developed. The central doctrinal text is *R.A.V. v. City of St. Paul*,<sup>5</sup> in which the Court debated at great length the conflict between the two principles. Upon a close reading, that text reveals deep fissures and inconsistencies that the Court's reasoning fails to resolve or, in many instances, even address.

In Part IV, I analyze contemporary expression/equality rhetoric in the political discourse surrounding multiculturalism. The claims and critiques associated with multiculturalism reveal not one debate, but a series of component questions that also underlie the legal discourse surrounding the expression/equality dichotomy. Analyzing the cluster of issues raised by debates over multiculturalism illuminates many of the foundational contests that arise under the rubrics of both free expression and equality.

Lastly, I outline an approach that puts the values of anti-orthodoxy and equality at the center of the argument. I do not suggest that all tension will simply evaporate by this move. However, it does shift the valence of the debate and helps to reframe this persistent constitutional paradox in a way that enables a richer understanding, both historically and jurisprudentially.

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<sup>4</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>5</sup> 505 U.S. 377 (1992).

## I. THE CONSTRUCTION OF A DICHOTOMY

### A. *Modern First Amendment Law*

Let us consider that one explanation for the persistence and tenacity of this dichotomy is simply that it is true. Perhaps there *is* an inherent, irreducible conflict between the value of free, independent thought and expression on the one hand, and equality of persons and groups on the other. There unquestionably is a conflict between them insofar as each “side” in the debate asserts a claim to the pinnacle of normative value, claiming itself to be the magic key necessary to unlock the full promise of constitutional democracy.

But that is not the only, nor, I argue, the most persuasive explanation for this enduring opposition. A more nuanced explanation can be discerned from tracing the history of how each doctrine functioned as oppositional discourse and how each shaped and was shaped in turn by the meaning of the other. The resulting body of law then flowed into larger cultural channels, which deepened some of its features while depleting others.

During the first half of the twentieth century, First Amendment law was shaped by the oppositional politics of radical leftist organizations which focused their ideology on issues of economic class and the concept of class solidarity. What is important to this article is not their political arguments per se, but the social context surrounding their real and perceived solidarity. The individualist emphasis of the free speech law that developed misunderstood and misrepresented what were powerful aspects of equality and identity issues just beneath the surface. The dissident organizations were united by strong cultural and often ethnic bonds, as well as by ideology. This misunderstanding set the stage for the law’s construction of expression and equality as an exaggerated dichotomy.

#### 1. *Dissent and Social Practice*

The seminal cases of modern First Amendment jurisprudence arose when radical leftists of various stripes called for, at least in some cases, the overthrow of the government and its replacement by the unpropertied class. It was a war of ideas. Indeed, one of the war’s byproducts was Justice Holmes’ famous migrating metaphor, transferring “fighting faiths” to the marketplace.<sup>6</sup> The marketplace and the workplace were what the war was about.

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<sup>6</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .

This ideological challenge was not articulated in terms of any identity that we think of today as implicated by equality law. Its hallmark was, to the Court, “a silly leaflet by an unknown man.”<sup>7</sup> The bond asserted was that of economic class. The proposition that economic class formed the sole bond that counted was an essential part of the ideology.

Class solidarity was always, especially in the U.S., partial and provisional. The radical organizer, the speaker in most of these cases, could never take for granted that a worker with few assets and no wealth would identify with other workers. Unions and leftist organizations were voluntarist, to be joined upon persuasion. One might be born into poverty, but there was always the possibility—however dim in reality—that the worker would attain higher class status or, as a substitute, identify her own interests in aspirational alignment with those of the owners of wealth and the means of production. Because a few did succeed, all could—or so the argument went. Class solidarity commanded no automatic allegiance, only that which it could secure by persuasion, by argument based on ideas, or by speech.

The seminal First Amendment cases on political speech crystallized in the era during and immediately after World War I. Though the Court never framed them as such, they arose from group activity and concerned speech about class solidarity.<sup>8</sup>

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<sup>7</sup> *Id.* at 628 (Holmes, J., dissenting).

<sup>8</sup> *See, e.g.,* *Goldman v. United States*, 245 U.S. 474 (1918) (Emma Goldman and Alexander Berkman prosecuted under Selective Draft Law for conspiring to urge men not to register for the draft); *Kramer v. United States*, 245 U.S. 478 (1918) (prosecution under Selective Draft Law for urging men not to register for the draft); *Ruthenberg v. United States*, 245 U.S. 480 (1918) (prosecution under Selective Draft Law for inducing men not to register); *Schenck v. United States*, 249 U.S. 47 (1919) (prosecution under Espionage Act for distribution of Socialist Party leaflets); *Debs v. United States*, 249 U.S. 211 (1919) (prosecution under Espionage Act for speech by Socialist Party leader that undermined recruiting efforts); *Frohwerk v. United States*, 249 U.S. 204 (1919) (prosecution under Espionage Act for distribution of leaflet arguing that the purpose of the war was “to protect the loans of Wall Street”); *Abrams v. United States*, 250 U.S. 616 (1919) (prosecution under Espionage Act for distribution of “revolutionist,” “anarchist” leaflets); *Schaefer v. United States*, 251 U.S. 466 (1920) (prosecution under Espionage Act for publication of anti-war opinions and articles in German-language newspapers); *Pierce v. United States*, 252 U.S. 239 (1920) (prosecution under Espionage Act for distribution of Socialist Party leaflets); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (prosecution under Minnesota statute prohibiting speaking against enlistment for anti-war speech by Nonpartisan League official); *United States ex rel. Milwaukee Social Democratic Publ’g Co. v. Burleson*, 255 U.S. 407 (1921) (prosecution under Espionage Act for mailing of Socialist newspaper); *Gitlow v. New York*, 268 U.S. 652 (1925) (prosecution under New York criminal anarchy statute for circulation of Socialist Party papers); *Burns v. United States*, 274 U.S. 328 (1927) (prosecution under California criminal syndicalism act for advocacy of sabotage); *Whitney v. California*, 274 U.S. 357 (1927) (prosecution under California criminal syndicalism act for participation in Communist Labor Party meeting); *Stromberg v. California*, 283 U.S. 359 (1931) (prosecution under California statute prohibiting display of red flag).

Most were prosecutions under either the Espionage Act of 1917<sup>9</sup> or state laws against syndicalism.<sup>10</sup> They were directed at persons who opposed the war on leftist class-based grounds, primarily members of the Industrial Workers of the World (I.W.W. or Wobblies) or the Socialist Party.<sup>11</sup>

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<sup>9</sup> As enacted in 1917 and amended in 1918, the law prohibited making "false reports or false statements with intent to interfere" with the armed forces or to promote enemy forces; willfully causing or attempting to cause "insubordination, disloyalty, mutiny or refusal of duty"; obstructing or attempting or conspiring to obstruct recruiting or enlistment. Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219, (incorporated in 18 U.S.C. § 2388(a) (1994)). These provisions formed the basis for most of the major prosecutions except for *Abrams*, which invoked sections of the 1918 amendment that criminalized "disloyal, profane scurrilous, or abusive language about the form of government of the United States"; "language intended to bring the form of government . . . into contempt, scorn, contumely, or disrepute"; "language intended to incite, provoke, or encourage resistance" to the war effort; and advocacy of curtailing production of material needed for the war effort. Act of May 16, 1918, ch. 75 § 3, 40 Stat. 553, *repealed by* Act of March 3, 1921, ch. 136, 41 Stat. 1360.

<sup>10</sup> Syndicalism laws were enacted by twenty-one states and two territories. ELDRIDGE F. DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 21, 147 (1939). Additional states enacted laws against anarchy or sedition, also used against the same radical groups. ZECHARIAH CHAFFEE, JR., FREEDOM OF SPEECH 187-93, 399-405 (1920).

*Syndicat* is the French word for trade union. Syndicalism began as a militant trade union movement in France in the 1890s. Its hallmark was its rejection of Marxist methods simultaneously with its adoption of fundamental Marxist principles such as class struggle and a goal of proletarian control. Syndicalists eschewed political organizing directed at agencies of the state in favor of direct action, including strikes, in and about the workplace. One strain of the movement was anarcho-syndicalism, characterized by advocacy of the abolition of the state and its replacement by voluntary associations. THE HARPER DICTIONARY OF MODERN THOUGHT 23, 619 (Alan Bullock & Oliver Stallybrass eds., 1977).

<sup>11</sup> See, e.g., PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 95-96, 104-05, 226-38 (1979); ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 116-28 (1978); MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 376-82 (1969); PHILIP S. FONER, 4 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 557 (1947) [hereinafter FONER, HISTORY]; WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS: 1903-1933, at 99-103, 182-87 (1963); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion, in* *Whitney v. California*, 29 WM. & MARY L. REV. 653, 654-56 (1988).

The annual reports of the American Civil Liberties Union (ACLU) document how specific the targets of the prosecutions were. "There are 53 prisoners in the federal penitentiaries still serving sentences under the Espionage Act for expressions of opinion. . . . All but four of the prisoners are members of the I.W.W. . . ." American Civil Liberties Union, *Work Ahead* (February 1923), 1921-22 ANNUAL REPORTS 33. "There are 58 prisoners under criminal syndicalism or sedition laws, in the following states: California, 29 I.W.W.'s and 3 members of the Communist Labor Party; Washington, 18 (all I.W.W.'s); Idaho, 3 (all I.W.W.'s); Pennsylvania, 4 (communists); and Kansas, 1 (I.W.W.)." *Id.* at 34. "Arrests of I.W.W.'s have continued throughout the year." ACLU, *Free Speech in 1924*, 1925 ANNUAL REPORTS 19.

Protests of the war by Wobblies and Socialists grew directly out of a political belief that workers should fight only for redistribution of wealth, and that the war served only the interests of capitalists.<sup>12</sup> The union's tenets formed in reaction to capitalist business interests. These leftists saw government policy as largely epiphenomenal. They believed the state to be little more than a front for capitalist interests.<sup>13</sup>

The government's reaction to the Wobblies was extreme. Business interests, especially in the western states where Wobblies concentrated their efforts, lobbied Congress and federal officials to crack down on the union's militant and disruptive organizing tactics, and they did. At the state level, virtually all of the syndicalism laws were enacted between 1917 and 1920, in an open effort to suppress the Wobblies.<sup>14</sup> Such statutes prohibited the advocacy of syndicalism, which the statutes defined as a doctrine "which advocates crime, violence, sabotage or other unlawful acts as a means of . . . reform."<sup>15</sup> Unlike the Socialists, who eschewed violence, the Wobblies, as self-proclaimed syndicalists, advocated sabotage in varying degrees.<sup>16</sup> For both the Wobblies and the Socialists, their pre-war radicalism led them to oppose the war, and their opposition to the war provided an excuse for federal action to eradicate the threat they posed to industrial peace.<sup>17</sup>

Whatever their impact on labor law, it is to the Wobblies that we owe the concept of using claims to free speech as something more than byproducts of a protest movement. Wobblies were the first to engage in political actions labeled specifically

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<sup>12</sup> DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM 1865-1925*, at 371-72 (1987); FONER, *HISTORY* *supra* note 11, at 554-57; DUBOFSKY, *supra* note 11, at 350-58.

<sup>13</sup> DOWELL, *supra* note 10, at 26-29. This analysis extended to the courts, which Wobblies viewed as merely a "mirror" reflecting the interests of those who owned the means of production. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 86 (1997) (quoting *Why Free Speech is Denied the I.W.W.*, INDUS. WORKER, Nov. 17, 1909, at 4).

<sup>14</sup> DOWELL, *supra* note 10, at 21, 45-50; MURPHY, *supra* note 11, at 86-87; PRESTON, *supra* note 11, at 99-103; GOLDSTEIN, *supra* note 11, at 115-16. In California, one municipality made it a crime to belong to the I.W.W. That ordinance was stricken in *Ex Parte Campbell*, 221 P. 952 (Cal. Dist. Ct. App. 1923). However, mere membership was a sufficient basis upon which to convict for criminal syndicalism. *People v. McClennegen*, 234 P. 91, 101 (Cal. 1925). Membership also sufficed to support a conviction for criminal anarchy in Washington. *State v. Lowery*, 177 P. 355 (Wash. 1918).

<sup>15</sup> DOWELL, *supra* note 10, at 17.

<sup>16</sup> See *Burns v. United States*, 274 U.S. 328 (1927) (upholding conviction for advocacy of sabotage). Syndicalists called for direct action by workers. Depending on the speaker, "direct action" could mean strikes, peaceful workplace resistance, sabotage or acts of violence. FONER, *HISTORY*, *supra* note 11, at 13-22, 160-71.

<sup>17</sup> DUBOFSKY, *supra* note 11, at 378-82.

as “free speech fights.”<sup>18</sup> In city after city, the Wobblies’ organizers initiated “direct action” campaigns that began with setting up a makeshift platform, often a soapbox, and entreating listeners to join or contribute funds to the I.W.W. When the first wave of speakers were imprisoned, dozens or hundreds more Wobblies would arrive and go through the same process of speaking and being carried off to jail.<sup>19</sup> The arrests created political prisoners and reframed the local dispute, often publicized nationally, to focus on free speech.

Wobblies were divided among themselves over whether these fights were worth the resources devoted to them or were simply distractions from the central aim of organizing the workplace. Nonetheless, they initiated the use of First Amendment claims as a deliberate strategy. Ironically, given the courts’ invocation of the soapbox as a symbol for the speech of the individual iconoclast for decades after,<sup>20</sup> many of the earliest soapbox speakers were anything but loners—they were teams of Wobblies.<sup>21</sup>

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<sup>18</sup> The facts in this and the following paragraph are based on RABBAN, *supra* note 13, at 78–128; FONER, HISTORY, *supra* note 11, at 172–213; DUBOFSKY, *supra* note 11, at 173–97. *See also* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America’s “First Freedom,” 1909–1931*, 40 WM. & MARY L. REV. 557, 566–72 (1999); Philip S. Foner, *Introduction*, in FELLOW WORKERS AND FRIENDS: I.W.W. FREE SPEECH FIGHTS AS TOLD BY PARTICIPANTS 3–22 (Philip S. Foner, ed., 1981) [hereinafter Foner, *Introduction*].

<sup>19</sup> Elizabeth Gurley Flynn, an I.W.W. organizer who was one of the originators of free speech fights during a strike in Montana in 1908, called them “performances” in a speech reflecting on her career.

There were many free speech fights. . . . [T]hey would send out telegrams something like this, and say: “Foot Loose Wobblies, come at once, defend the Bill of Rights,” and they would come . . . by the hundreds literally they would land in these communities, . . . and they would stand up on platforms or soap box and they would read part of the Constitution of the United States or the Bill of Rights. . . . [T]hese performances were repeated innumerable times.

Elizabeth Gurley Flynn, *Memories of the Industrial Workers of the World*, Address at Northern Illinois University (Nov. 8, 1962), at <http://www.geocities.com/CapitolHill/5202/rebelgirl.html> (on file with the Ohio State Law Journal). *See also* ELIZABETH GURLEY FLYNN, *THE REBEL GIRL: AN AUTOBIOGRAPHY* 103–08, 170–73, 177–79 (1973 ed.).

<sup>20</sup> *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”)

<sup>21</sup> The I.W.W. began in 1905. FONER, HISTORY, *supra* note 11, at 15. The earliest noted published use of “soap box” with a political connotation was in Jack London’s memoir, *THE ROAD* 211 (1907) (“I get up on a soap-box to trot out the particular economic bees that buzz in my bonnet.”); J.A. SIMPSON & E.S.C. WEINER, XV *THE OXFORD ENGLISH DICTIONARY* 897 (1989). London’s memoir does not mention the I.W.W. specifically, but many of the experiences that he describes were in the company of transient workers in the West who comprised much of the I.W.W.’s membership. Philip Foner credits Socialists in Seattle with first challenging bans on



The zeal that enabled the Wobblies to mobilize scores of transient workers into organizational activists created a social identity, as well as an ideology. Wobblies were often compared, by themselves and others, to a religion.<sup>22</sup> One historian of religion has argued that the comparison is more than metaphorical or dismissive: the Wobblies' critique of capitalism drew directly on the Social Gospel movement, then a widespread form of populist Christianity.<sup>23</sup> Moreover, their organizing methods suggested religiosity as well: the Wobblies' extensive use of music to inspire their followers imitated the hymn-singing at rural camp meetings and revivals, no doubt triggering those associations among listeners.<sup>24</sup> Nor was the music treated as trivial by the courts. Some of the songs were used against them, read into evidence by the prosecution.<sup>25</sup>

It was that extraordinary collectivity that led to their repression. The defendants in the major wartime cases were essentially prosecuted as representatives of the Wobblies or the Socialist Party, not as lonely voices on soapboxes.<sup>26</sup> Their opposition to the war came from a specific ideological location, which in turn grew out of the strength of a collective identification based on class. The sense that they posed a significant threat came from the fact that they represented not isolated individuals, but an organized constituency with a shared creed. They not only engaged in mere acts of conscience, but they also called for one great industrial union.<sup>27</sup> Radical leftists were not the only persons who experienced the repression of that era, but they bore the brunt of it. More conventional trade unionists supported the war,<sup>28</sup> and more

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speakers by filling local jails with soapbox orators, but that tactic soon became associated primarily with the Wobblies. Foner, *Introduction*, *supra* note 18, at 13–14.

<sup>22</sup> DONALD E. WINTERS, JR., *THE SOUL OF THE WOBBLIES: THE I.W.W., RELIGION AND AMERICAN CULTURE IN THE PROGRESSIVE ERA 1905–1917*, at 3, 7–9, 61–63 (1985).

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.* at 37–38. A character in a World War II-era novel described the Wobblies: "They called themselves materialist-economists, but what they really were was a religion. . . . [T]hey were welded together by a vision we don't possess. . . . And sing! [Y]ou never heard anybody sing the way those guys sang! Nobody sings like they did unless its for a religion." JAMES JONES, *FROM HERE TO ETERNITY* 640 (1951); See also DUBOFSY, *supra* note 11, at x. To that end, the I.W.W. published a "Little Red Song Book." RABBAN, *supra* note 13, at 79.

<sup>25</sup> WINTERS, *supra* note 22, at 42; Blasi, *supra* note 11, at 659.

<sup>26</sup> Charles Evans Hughes, in the interval between his periods of service as a Supreme Court Justice, noted that the New York legislature's refusal to seat five elected members because they were Socialists revealed the centrality of the group identification: "I understand that the action is not directed against these five elected members as individuals but that the proceeding is virtually an attempt to indict a political party." *Hughes Upholds Socialists' Rights*, N.Y. TIMES, Jan. 10, 1920, at 1 (reprinting Letter from Charles E. Hughes to Thaddeus C. Sweet, Speaker of the New York Assembly, (Jan. 9, 1920)), *quoted in* ZECHARIAH CHAFEE, JR., *THIRTY-FIVE YEARS WITH FREEDOM OF SPEECH* 10 (1952).

<sup>27</sup> FONER, *supra* note 11, at 167.

<sup>28</sup> MONTGOMERY, *supra* note 12, at 375 (indicating that the AFL supported the war).

traditional pacifists and non-party-aligned leftists, though prosecuted, were better able to mobilize support to curtail or end their harassment.<sup>29</sup> Although other anti-war or pro-German sympathizers were also prosecuted, the cases from which the “clear and present danger” debates in First Amendment law sprang involved union or party members.

After the Wobblies’ destruction and the Socialist Party’s decline after the war, subsequent prosecutions under state criminal syndicalism or anarchy statutes targeted members of the then-new Communist Party or organizers from what remained of the left-wing of the labor movement.<sup>30</sup> By the time the McCarthy Era began, prosecutions under the Smith Act focused on the Communist Party as such.<sup>31</sup> But the belief that the early “clear and present danger” cases grew from the individual radical on a soapbox, and that the targeting of organizations began later with the Communist Party, is false.<sup>32</sup> The group affiliation of the targets was the driving force behind who was prosecuted for political speech from the beginning of modern speech law.

Although not acknowledged, cross-cutting vectors of identity also lay beneath the surface of these cases. Hostility against immigrants was intense, and anti-Semitism and bias against Catholics festered in the background of many battles about economic class.<sup>33</sup> Underlying the reaction against much of the leftist organizing was repugnance at the predominantly non-Anglo backgrounds of the leaders.<sup>34</sup>

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<sup>29</sup> MURPHY, *supra* note 11, at 57–65, 99–101.

<sup>30</sup> ACLU, *The Story of the Activities of the American Civil Liberties Union 1928–1929*, 1928–29 ANNUAL REPORTS 4:

The record for 1928 shows more meetings broken up by the police, more arrests under local laws in free speech cases, more injunctions than in any year since 1921. The causes were primarily the campaign activities of the Communist Party and its related organizations, and the left-wing strikes in the coal and textile industries.

<sup>31</sup> See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>32</sup> Emerson’s work, for example, concentrates on the doctrinal development of which test is used to assess when government may proscribe an individual’s expression of political belief. Group identity as such figured prominently in his analysis only in the McCarthy Era. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 129–41 (1970). Harry Kalven, on the other hand, recognized the importance of the group context for the seminal First Amendment cases. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREE SPEECH IN AMERICA* (Jamie Kalven, ed.) 121, 133–34, 191–92 (1988). He also recognized, however, that in the Court’s opinions, the shift from an individual speaker to a group affiliation focus began with the Smith Act prosecutions. *Id.* at 192.

<sup>33</sup> William Nelson has suggested that our understanding of the judicial response to that social movement should be broadened to include not only the speech cases, but also cases establishing the rights of religious minorities. William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 13 (1995).

<sup>34</sup> MONTGOMERY, *supra* note 12, at 461–64. Anti-radical trade unionists during World War I launched a campaign “to Americanize the labor movement in greater New York.”

These biases are also evident from the flavor of the text in judicial decisions.<sup>35</sup> Often immigrant status and ethnicity or religion melded in the public's mind and in judicial proceedings. In one prosecution in federal court in Indiana, the judge remarked:

I think that about the least commendable sort of folks I know are these Russians . . . . Why? Because we do not give them everything they want. [A public speaker] was here not long ago and delivered an address, but she didn't simply want the Jews to have their rights. The trouble with [the speaker] is that she wanted the Jews to have everything that we have got; and that is the way with [the defendant].<sup>36</sup>

The conflation of ethnicity with viewpoint flavored two of the keystone decisions of the era. In *New York v. Gitlow*, the Appellate Division opined that "[w]e find these doctrines (of proletarian dictatorship) principally advocated by those who come from Russia and bordering countries and their descendants, as is the appellant."<sup>37</sup> The New York Court of Appeals noted that "it doubtless would be something of a shock to citizens of this state to be told that persons born in other countries and saturated with anarchistic and revolutionary notions might come into this state and advocate the overthrow by force of our present government without being liable."<sup>38</sup> Gitlow's co-defendant at trial, James Larkin, was repeatedly referred to by the *New York Times* as "the Irish agitator."<sup>39</sup>

Similarly in *Abrams v. United States*,<sup>40</sup> the identity of a Russian Jew and the belief in leftist philosophy were treated as one. After twice asking Abrams on the stand, "Why don't you go back to Russia?" Federal District Court Judge Henry Clayton commented that, "I wish these people were over there now."<sup>41</sup> At sentencing he stated that Jews, especially, understood the benefits of capitalism. "Talk about your old Jerusalem! I don't blame our good, free American Jewish citizens for not wanting to go back to Jerusalem. They have got a better thing in old New York."<sup>42</sup> All the evidence, in his view, proved conclusively that "you never can get the American idea

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<sup>35</sup> *Id.* at 376.

<sup>36</sup> CHAFEE, *supra* note 10, at 82–83 (quoting the unreported 1918 case of *United States v. Zimmerman*).

<sup>37</sup> *New York v. Gitlow*, 187 N.Y.S. 783, 791 (App. Div. 1921). Gitlow himself was born in New Jersey, of immigrant parents.

<sup>38</sup> *New York v. Gitlow*, 136 N.E. 317, 325 (N.Y. 1922).

<sup>39</sup> See, e.g., *Prosecutor Calls Gitlow Communist*, N.Y. TIMES, Jan. 31, 1920, at 2; *Gitlow and Larkin Must Serve Terms*, N.Y. TIMES, July 13, 1922, at 14.

<sup>40</sup> 250 U.S. 616 (1919).

<sup>41</sup> RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT AND FREE SPEECH* 121 (1987).

<sup>42</sup> *Id.* at 143.

into the head of an anarchist."<sup>43</sup> In the Supreme Court's opinion in the case, the description of the defendants' activities contains pointed references to the fact that the radical literature that served as the basis for the charges was published in Yiddish.<sup>44</sup>

Thus, although the formal doctrinal debates about early First Amendment law made no mention of prejudice or equality concerns and focused solely on the degree of danger posed by anti-capitalist philosophy, the inflections of identity were there from the beginning.

## 2. *The Trope of Individualism*

Prior to World War I, very little First Amendment law existed, and the pre-war scholarship did not influence doctrine until after the war.<sup>45</sup> Since then, in the extensive scholarship debating the relative importance of which of the First Amendment's civic functions best justify its primacy, the shared point of departure has been the role of individualism.<sup>46</sup> The context for nearly all these cases was a criminal prosecution of specific persons. Often, however, they were prosecuted in groups. The doctrine, then in its infancy, could have been grounded more in associational rights, as a branch of it later was.<sup>47</sup> Instead, four strands converged in these cases to produce the individualist conceptualization of speech rights.<sup>48</sup>

The first was the radical libertarianism of those being prosecuted, especially the Wobblies. Central to the Wobblies' revolutionary syndicalism was a rejection of the state and focus on the workplace. Indeed, the Socialist Party attacked the Wobblies

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<sup>43</sup> *Id.* at 142.

<sup>44</sup> *Abrams*, 250 U.S. at 617.

<sup>45</sup> RABBAN, *supra* note 13, at 210; MURPHY, *supra* note 11, at 17–20.

<sup>46</sup> Calvin R. Massey, *Hate Speech, Cultural Diversity and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992). "The striking fact that emerges is that, no matter what rationale is offered for free expression, the ultimate root of the guarantee can be traced to deeply individualistic premises." *Id.* at 135. Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 320–21 (1988) ("[T]he values and assumptions of individualism . . . unquestionably [have] become the great tradition of first amendment thought."); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990) ("The First Amendment's purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism . . . within us all.").

<sup>47</sup> See *infra* Part I.C.

<sup>48</sup> A more broadly focused intellectual history of this period attributes the dominance of individualism to "the emergence of . . . modernist consciousness." G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 301 (1996) [hereinafter White, *The First Amendment Comes of Age*]. Modernist legal writers "took humans to be free in the deepest sense: free to master and to control their own destinies." *Id.* at 304.

for exhorting workers to ignore politics.<sup>49</sup> Vis-a-vis the state, the Wobblies called for individual liberty. In this they were joined by the other significant free speech movement prior to World War I, the "free love" and early birth control advocates, who faced prosecution under the Comstock Act.<sup>50</sup> Their own rhetoric in relation to the state celebrated a very personal notion of freedom and a deep hostility to any limitations on speech.

The second strand was composed of believers in a traditional liberty of contract individualism. "Conservative libertarians" believed that the liberties of contract and speech were linked; unlike leftists such as the Wobblies, they believed that private property was essential to individual freedom.<sup>51</sup> Justice Holmes embodied this philosophy. Initially, jurists such as Holmes accepted that the state had the power as a property owner to control speech on public property<sup>52</sup> and could properly punish speech with "bad tendencies."<sup>53</sup> Holmes' view on this question shifted dramatically at the very end of the war, as was reflected in the difference between his position as the author of *Schenk* and a dissenter in *Abrams*. Holmes came to believe that such usages of state power amounted to authoritarianism, against which individual freedom of conscience provided the best defense.<sup>54</sup> Throughout his career, however, individualism (in a matrix with market and property) served as the framing paradigm.

The third base for the individualism, so completely incorporated in this critical moment into First Amendment jurisprudence, was exemplified by the philosophy of Justice Brandeis. Brandeis shared the views of his contemporaries in the progressive movement, who moved away from traditional concepts of individualism to an

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<sup>49</sup> DOWELL, *supra* note 10, at 26 n.17.

<sup>50</sup> Act of March 3, 1973, ch. 258, § 2, 17 Stat. 599 (current version at 18 U.S.C. § 1462 (1994)); RABBAN, *supra* note 13, at 75–76, 213. Among those persons was Emma Goldman, who defended "an unlimited exercise of expression," and Roger Baldwin, founder of the American Civil Liberties Union, who was deeply influenced by Goldman. MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 53–54 (1991).

<sup>51</sup> GRABER, *supra* note 50, at 21.

<sup>52</sup> *Commonwealth v. Davis*, 162 Mass. 510 (1895) (written by Justice Holmes while he was on the Supreme Court of Massachusetts), *aff'd*, *Davis v. Massachusetts*, 167 U.S. 43 (1897). The Court repudiated this analysis in *Hague v. CIO*, 307 U.S. 496 (1939). For a re-reading of *Davis* arguing that Holmes' view was analogous to a legitimate time, place, and manner restriction when understood in light of the late nineteenth-century design of public parks as pastoral enclaves, see Steven L. Winter, *An Upside/Down View of the Counter Majoritarian Difficulty*, 69 TEX. L. REV. 1881, 1895–1900 (1991).

<sup>53</sup> In *Fox v. Washington*, 236 U.S. 273 (1915), for example, Justice Holmes wrote the opinion of the Court upholding a statute that criminalized the advocacy of nudism.

<sup>54</sup> RABBAN, *supra* note 13, at 343, 349–55; G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 412–54 (1993); White, *The First Amendment Comes of Age*, *supra* note 48, at 318–23; Robert M. Cover, *The Left, the Right and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 372–74 (1981).

emphasis on the interdependent, interactive nature of social rights.<sup>55</sup> Brandeis saw speech primarily as a right "essential" to the functioning of "effective democracy."<sup>56</sup> He saw freedom of speech as a shared positive good, necessary to the proper development of a citizen. He invoked the Founders, who "valued liberty both as an end and as a means."<sup>57</sup> Despite his different focus, however, Brandeis framed speech rights in language as individualist as Holmes's.

Lastly, the link that previous scholars have not recognized is that the politics of interpretive enterprise itself locked in the individualist focus. Each of these cases concerned the proper relationship between the speaker's true intent and the predictable reaction of the audience. The jurists uniformly assumed a chain leading from the speaker's thoughts to his words to the audience's comprehension to their acts in response. The major debate arose over where to draw the line of illegality, whether at the speaker's words or the audience's reaction. Under the old approach, the line was drawn in the audience: if they reasonably could be expected to act on the exhortations, the speaker was liable.<sup>58</sup>

The victory for free speech lay in jettisoning the "bad tendencies" focus initially favored by Holmes and the majority of the Court and adopting a test centered on whether the words themselves constituted direct incitement.<sup>59</sup> Thus, in substantial

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<sup>55</sup> RABBAN, *supra* note 13, at 17–18; GRABER, *supra* note 44, at 75–83, 87–104, 115–21; White, *The First Amendment Comes of Age*, *supra* note 42, at 323–27; Cover, *supra* note 54, at 373–87; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 458–66 (1988); Bobertz, *supra*, note 18, at 634–40. Chafee also invoked both individualist and social rationales for protecting speech. CHAFEE, *supra* note 10, at 36. His primary achievement, however, was his radical reinterpretation of Holmes, appropriating the legendary figure of Holmes to serve as the fountainhead for a progressive civil libertarian concept of speech, despite Holmes' continued allegiance to more conservative principles associated with the freedom to contract. GRABER, *supra* note 50 at 1–7, 122–51; RABBAN, *supra* note 13, at 353–54.

<sup>56</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring).

<sup>57</sup> *Id.* at 375 (Brandeis & Holmes, JJ., concurring).

<sup>58</sup> For example, Justice Holmes wrote in *Debs* that the law properly allowed the jury to determine that "one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting . . . [and] that would be its probable effect." *Debs v. United States*, 249 U.S. 211, 214–15 (1919).

<sup>59</sup> "Advocacy of law breaking" that "falls short of incitement" could be punished only upon a showing that "the advocacy would be immediately acted on" with "the probability of serious injury." *Whitney*, 274 U.S. at 376–78. Justice Holmes also acknowledged, however, that the law of criminal attempt provided the source for his clear and present danger test. GRABER, *supra* note 50, at 110–11.

The new test became settled law in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). "Under *Brandenburg*, probability of harm is no longer the central criterion for speech limitations. The inciting language of the speaker—[Judge Learned] Hand[s] focus on 'objective' words—is the

measure, the liberty-enhancing intervention was to *de*-contextualize, to ignore the audience's reaction or likely reaction, and to focus solely on the words of the individual speaker. By this strategy, liberals sought to remove the guilt by ignoring the association.

The new test also turned the speaker into a cipher. Her race, ethnicity, and social identity had never been acknowledged as part of any constitutional standard, although those factors weighed heavily in the cases. Now they became even less likely to surface in judicial texts, since the analysis focused narrowly on the words spoken or published, largely without regard to who the speaker or audience was.

The eventual triumph of free speech, by the establishment of tight limits on the state's power to silence radicals, marked not only a recognition of a citizen's moral autonomy and integrity, but also a willingness to take the risk of allowing space for sharply competing ideologies. The rhetorical vindication of free speech may have rung most loudly when associated with a likelihood that the defenders of the state would win the persuasion game. As Bradley Bobertz noted, "Tolerance of speech was made easier once it was clear that the words would lead nowhere."<sup>60</sup> Central to its normative hold, however, was acceptance of the possibility that anyone could ultimately persuade a majority that minds do change.<sup>61</sup> The moral luster associated with the First Amendment flows from its willingness to take that risk.

The possibility of class mobility and the risk of ideological mobility grounded the right to expression and dissent. Mobility was in turn associated with individualism. It is, after all, individual minds that change. Moreover, at least occasionally, they could change in either direction. Leftists may have castigated the figure of Horatio Alger as a traitor to his class, but Wall Street hated Franklin Roosevelt for the same reason. Individualism of belief became the ultimate marker of freedom, especially, if

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major consideration." Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine*, 27 STAN. L. REV. 719, 755 (1975).

<sup>60</sup> Bobertz, *supra* note 18, at 621.

<sup>61</sup> Justice Holmes's rhetoric is especially stirring because of its invocation of this theme. In his first break with the "bad tendencies" test, in *Abrams*, he concluded the paragraph containing his famous statement about "the best test of truth" being in the marketplace as follows: "That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Gillow*, he returned to the same point. "Every idea is an incitement. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

Justice Douglas had no better luck in arguing a variation on the same theme, that unpopular speakers pose no real threat. American Communists, he wrote, "are miserable merchants of unwanted ideas. . . . [They are] the best known, the most beset, and the least thriving of any fifth column in history. Only those beset by fear and panic could think otherwise." *Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting). Holmes's and Douglas's dissents, in modified form, ultimately became law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

not only, in First Amendment jurisprudence. Individualism supplied the cultural meaning of the First Amendment and became indelibly associated with the nation's keystone freedom.

The dominant trope of individualism in First Amendment law succeeded in thoroughly de-socializing dissent, despite the fact that the definitive law of dissent emerged from a line of cases involving organized, thoroughly socialized expression. Individualism retained the mobility and fluidity implicit in concepts of dissent, but drained dissent of its interactive, social character. The framing of the right as so deeply individualist appropriated conservative rhetoric, and was an extremely effective political strategy. Its long-term effect, however, was to conservatize the speech doctrine even as it sheltered the society's most radical critics. In a parallel paradox, the more conservative trade unionists who adopted an interest group benefits approach devoid of a "bigger" ideological framework produced the highly regulatory body of labor law with its statutory management of the workplace.

Like the soapbox, the First Amendment became an icon of individualism as much in spite of, as because of, its history. The cultural meaning of the First Amendment, so suffused with celebrations of the individual, is starkly different from the social practices—the "free speech fights" led by leftist unions and political parties that advocated working class solidarity—that in fact generated its modern viability. Yet both those meanings of expressive freedom remain possible. If, as Steven Shiffrin writes, "America . . . regards the first amendment as an important symbol of what the country means,"<sup>62</sup> it is also true that it is a highly labile symbol.

## B. *Equality and Identity*

In contrast to the sharp individualism that permeates the law of speech, the concept of discrimination in contemporary Equal Protection Clause jurisprudence turns on the description and evaluation of characteristics of particular groups. Although the right to equal treatment belongs to the individual, the courts ascertain to what extent that right will be protected in a series of inquiries related to the groups to which one belongs. If there is a reasonably plausible state interest which could be served by using a challenged classification, the Court will uphold it under a rational basis test.<sup>63</sup> The exception to this deference arises for classifications that trigger heightened scrutiny; and to be accorded heightened scrutiny, the Court examines characteristics of the group.

The obvious threshold prerequisite is that the characteristic be unrelated to the qualifications relevant to the specific benefit or project at issue. Two related factors upon which the Court has settled are a history of prejudice and discrimination against

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<sup>62</sup> SHIFFRIN, *supra* note 46, at 5.

<sup>63</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 318–21 (1993).



the group and a resulting lack of political power in pluralist legislative bargaining.<sup>64</sup> A third factor that has appeared and disappeared in the Court's various formulations of a test for strict scrutiny is whether the characteristic that defines the group is immutable.<sup>65</sup> Immutability is the "it's not her fault" principle: an individual should not be punished for a characteristic that she cannot control.<sup>66</sup> "[L]egal burdens should bear some relationship to individual responsibility."<sup>67</sup> Immutability in turn is used as a proxy for the two different subsidiary questions of whether the individual had control over the acquisition of the characteristic and whether the individual can control the manifestation of the characteristic.<sup>68</sup> Under either of those meanings, however, requiring immutability purges the group of any ideological component to its defining characteristic, since ideas are under the individual's control, both in their acquisition and expression.

The Court has never specifically stated that immutability is a prerequisite for heightened scrutiny,<sup>69</sup> and scholars have extensively analyzed the illogic of requiring it.<sup>70</sup> Despite the chorus of criticism, however, lower courts continue to rely on it.<sup>71</sup>

<sup>64</sup> See *Kimel v. Fla. Bd. of Regents*, 120 S.Ct. 631, 645–48 (2000); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–44 (1985); *Plyler v. Doe*, 457 U.S. 202, 216–17 n.14 (1982); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359–61 (1978).

<sup>65</sup> The Court first relied on immutability in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175–76 (1972).

<sup>66</sup> Thus it is no accident that the Court relied most heavily on immutability in cases involving children, such as *Weber*, 406 U.S. 164, a case involving denial of benefits to children born out of wedlock, finding such discrimination unlawful largely on the ground that the children had no control over their status as "illegitimate," *id.* at 175–76, and *Plyler*, 457 U.S. 202, where the Court refused to allow Texas to exclude children of illegal aliens from the public schools, reasoning that the children had no control over the illegal acts of their parents.

<sup>67</sup> *Weber*, 406 U.S. at 175, *quoted in* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). See also Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 148 (1990) ("Intuitively, all other things being equal, a person who is harmed because of an immutable trait deserves more moral and legal concern than one harmed because of a mutable trait.").

<sup>68</sup> See Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 276–82 (1996). For a discussion of immutability as a valid social, but not biological factor, see Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).

<sup>69</sup> Notably, there was no mention of immutability in the Court's most recent summary of factors triggering the highest level of review. See *Kimel*, 120 S.Ct. 631. However, the Court continues to stress the relevance of a group being a "discrete and insular minority." *Id.* at 645.

<sup>70</sup> See generally Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) [hereinafter, Yoshino, *Suspect Symbols*]; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Karen Engle, *The Persistence*

Moreover, some lower courts have gone so far as to import an immutability requirement in interpreting civil rights statutes, ruling that discriminatory policies are allowable if they burden changeable characteristics (hair length or the ability to speak English, for example).<sup>72</sup> As a result, the specter of an immutability requirement hovers over a broad swath of equality law.

In my view, immutability continues its chimerical existence despite its illogic because it serves a vital, if unacknowledged, function. It de-fangs the animus that produces various forms of discrimination by positing that animus as the product of irrational or mean-spirited prejudice, rather than as a full-blown ideology of dominance.<sup>73</sup> It locks in a status-based view of equal protection by assuring the stability of the category and thus the reliability of the hierarchy that it grounds. To describe a group as “different, immutably so,”<sup>74</sup> is to assure that this group’s boundaries are knowable, predictable, and unchanging.

There are essentially two functions of equal protection law. One is to protect the individual who shares the characteristics of a group that is falsely maligned. An example would be the exclusion of women from the practice of law on the ground that nature disqualifies females for such an occupation. The second function is to protect the individual who does not share the characteristics of a group about which certain norms may be empirically accurate. An example would be the exclusion of all women from heavy physical labor occupations requiring greater upper body strength than most women have. The first is a problem of inaccuracy and the second, of false generalization.

Both depend on the stability of the group’s membership. If the target group is viewpoint-defined rather than “naturally” defined—for example—if the target group

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*of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997); Feldblum, *supra* note 68.

<sup>71</sup> “[W]hen addressing a characteristic, such as age, that is not the kind of immutable characteristic as race, gender, or national origin, it is questionable that Congress could lawfully be acting to enforce the Fourteenth Amendment.” *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426, 1430 n.8 (11th Cir. 1998), *reh’g denied*, 157 F.3d 908 (11th Cir. 1998), *aff’d on other grounds*, 120 S.Ct. 631 (2000). The Third Circuit based its holding that mental retardation qualifies as the predicate for a class-based animus, as required by 42 U.S.C. § 1985(3), on the fact that retardation is immutable. *Lake v. Arnold*, 112 F.3d 682, 687–88 (3d Cir. 1997).

<sup>72</sup> See generally Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987). Since the Bayer article, courts have continued to require immutability in Title VII cases. *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385 (11th Cir. 1998) (hair length). See also *DeNovellis v. Shalala*, 124 F.3d 298, 314 (1st Cir. 1997) (“If America stands for anything in the world, it is fairness to all, without regard to race, sex, ethnicity, age, or other immutable characteristics that a person does not choose and cannot change.”).

<sup>73</sup> Neil Gotanda echoes this point when he argues that treating race as immutable “contribute[s] to a societal view of race as a neutral, objective and apolitical characteristic.” *A Critique of ‘Our Constitution is Color-Blind,’* 44 STAN. L. REV. 1, 28 (1991).

<sup>74</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985).

is feminists rather than women, multiple problems ensue. Individual group members may not even be women. Moreover, they can and do move in and out of the group, meaning that they do bear individual responsibility for the targeted characteristic. They can disassociate themselves from either an inaccurate assumption about the group or an accurate generalization that does not describe them simply by exit.

Both the agents of the state who classify and the challengers of those classifications depend upon the clarity and stability of definitional lines, and thus depend on reliable, fixed identities. Every equal protection challenge, the successful as well as the unsuccessful, reinscribes those classifications ever more deeply into the law.

There is a doubly paradoxical aspect to the enterprise. As Dan Danielsen and Karen Engle noted, law has “sought both to recognize identity groups and to make them irrelevant.”<sup>75</sup> The additional paradox is that in both moves—recognition and renunciation—the law strengthens the social power of the identity in question, simultaneously constituting and containing the class. Law “reinvest[s] these categories with meaning,” thus further instantiating the social formations that we call identity.<sup>76</sup> Judicial reliance on immutability perpetuates that process by allowing for judicial review to compensate for prejudice against only the most fixed of stigmatized markers.<sup>77</sup>

Implicitly, the converse proposition is also true. The immutability criterion facilitates policies targeted against the disempowered group that is united by belief. In his influential analysis, John Hart Ely described the precondition of immutability as not entirely irrelevant because it is aimed at discouraging people from joining a group and encouraging them to exit.<sup>78</sup> On this theory, using state power to discourage certain self-chosen identifications is permitted.

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<sup>75</sup> DAN DANIELSEN & KAREN ENGLE, *AFTER IDENTITY: A READER IN LAW & CULTURE* xiv (1995).

<sup>76</sup> MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW* 83 (1997). See also Balkin, *supra* note 70, at 2366–67.

<sup>77</sup> Scholars have debated whether the immutability factor protects against empathy failure. The principle of empathy failure is that a legislator will be less likely to impose burdens on a group defined by a characteristic that she has or could share—the “there but for the grace of God” point. If she feels comfortably positioned as others to the characteristic, and sure that she will never share it, she is less likely to tread softly in imposing burdens on those perpetual “others” who do. That situation justifies heightened judicial scrutiny of legislative classifications. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 160–61 (1980).

On the other hand, mutable characteristics do not always elicit empathy. Like universal characteristics, mutable traits, in theory, could be associated with anyone. Some mutable traits, however, are so repugnant that their very mutability engenders heightened antipathy. Homosexual orientation and lower economic class are two examples. Yoshino, *Suspect Symbols*, *supra* note 70, at 1823–24; Halley, *supra* note 70, at 517–21.

<sup>78</sup> ELY, *supra* note 77, at 154–55.

Equality advocates have responded, in part, by shifting the cultural meaning of particular group memberships. The southern civil rights movement presented a radical ideological challenge to southern apartheid, as well as an equality/identity claim. Southern legal resistance initially used many of the same statutes and kinds of statutes—loyalty oaths,<sup>79</sup> registration of political groups,<sup>80</sup> and authorization of legislative investigatory committees<sup>81</sup>—as were used during the McCarthy Era.<sup>82</sup> To some extent, the failure of southern White resistance can be attributed to the civil rights movement's victory in framing the issue as equality rather than left-wing ideology, even though a huge block of the case law produced by the movement was a continuation of First Amendment, rather than equality, jurisprudence.<sup>83</sup>

As a contemporary example, it is no wonder that many lesbian and gay rights advocates seized on scientific studies of genetics or hormones as a partial cause of homosexuality.<sup>84</sup> Such a move is an effort to shift the cultural meaning of "homosexuals" from one of persons characterized by volitional choices to one of persons with biologically determined affinities that the individual is powerless to affect. These examples illustrate the success for rights advocates that can come from de-ideologizing a group by recasting it in identity terms.

By contrast to the mobility intrinsic to the jurisprudence of expression, the jurisprudence of equality has grown into a dependence on fixity of identity, a doctrinal form of immobility. The dichotomizing dynamic itself, by positing viewpoint and equality as diametrically opposed, reinforces that fixity. The fluidity of viewpoint helps to constitute, diacritically, by contrast, the fixity of identity. Under this regime, concepts such as immutability function as containment mechanisms. Limiting strong equality claims to biologized categories erects borders to their scope and de-ideologizes the challenge posed by equality.

### C. *Points of Overlap*

The concept of expressive association is the closest the law has come to an appreciation of speech as a fundamentally social, rather than individual, activity. Ironically, it suffers from the same historical trajectory as First Amendment liberalism more generally, in which its celebration of individualism has come to dominate the doctrine.

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<sup>79</sup> See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>80</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

<sup>81</sup> *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963).

<sup>82</sup> HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 65–121 (1965).

<sup>83</sup> As Harry Kalven noted in 1965, "we may come to see the Negro as winning back for us the freedoms the Communists seem to have lost for us." *Id.* at 6.

<sup>84</sup> See Halley, *supra* note 70.

Although the significance of the realm of the interpersonal as generative of expression is central to expressive association, its philosophy flips the two, making the protection for the social contingent on and derivative of the individual. Doctrinally, protection for the social production of speech exists as correlative to the individual's right.<sup>85</sup>

The doctrine originated in the era of radical leftist movements, and served to protect individuals from guilt by association by forbidding the state to hold individuals accountable for the beliefs or actions of groups with which they associated.<sup>86</sup> The right of the individual to associate with groups without penalty so long as her own actions were lawful expanded to encompass a right to so associate without even the knowledge of the state.<sup>87</sup>

In later cases, the social nature of the right extended to reach the group itself. The group acquired a protected interest in expression, including the right to police membership to maintain its own viewpoint integrity.<sup>88</sup> Given its First Amendment origins, it is no surprise that the substance of the group's right is derivative of the individual's, the right not to be forced to distort its message.

I find no fault with such a right, but note that it is a multiplication of individual rights bundles, not a socialization of the expression right itself. Despite its potential to appreciate the social matrix that breeds expression, the doctrine has not expanded far enough—nor perhaps could it, given its origins—to restructure the underlying conflict between individualism and a collective claim. It gestures toward a harmonizing of the two wings of the dichotomy, but does not fully engage with them.

The second aspect of First Amendment doctrine that might be thought to offer a path toward a more nuanced understanding is the doctrine of content or viewpoint neutrality, itself the realization of an equality principle within expression law. In its initial explicit appearance, in *Police Department of Chicago v. Mosley*,<sup>89</sup> Justice Marshall struck down a local ordinance that distinguished between labor picketing and other picketing, pointedly grounding the holding in the Equal Protection Clause, rather than the “closely intertwined” First Amendment.<sup>90</sup> Proclaiming an “equality of status in the field of ideas,”<sup>91</sup> Marshall framed the right as one not to be discriminated against for being a person whose views government found unacceptable.

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<sup>85</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Patterson*, 357 U.S. 449 (1958).

<sup>86</sup> *De Jonge v. Oregon*, 299 U.S. 353 (1937).

<sup>87</sup> *Patterson*, 357 U.S. 449; *Brown v. Socialist Workers 74 Campaign Comm.*, 459 U.S. 87 (1982).

<sup>88</sup> *Roberts*, 468 U.S. 609 (1984).

<sup>89</sup> 408 U.S. 92 (1972).

<sup>90</sup> *Id.* at 95.

<sup>91</sup> *Id.* at 96.

*Mosley* teetered on the edge between the viewpoint of the speaker and the identity status of the speaker. The Court's equality result was framed in "who" terms, i.e., discrimination against a category of persons, but the category was nothing more than a proxy for viewpoint. On the facts of the case, the Court could not have gone further. *Mosley* was one of the few cases of its era that arose from a protest *not* grounded in a social movement. Earl Mosley's lonely picketing of a Chicago high school seemed to exemplify the actions of an idiosyncratic gadfly. The substance of his protest, however, was a complaint of race discrimination, and that may partially explain the inflections of equality that animate the Court's approach.

Had Marshall's efforts at interweaving the doctrines been taken up and elaborated, it might have led to a richer conceptualization of the interrelationship between equality and expression than that which inhabits constitutional law today. But it was not. Post-*Mosley* courts have refined content/viewpoint neutrality into a powerful mechanism of First Amendment protection, but one that takes no formal note of the speaker's identity *per se*. What the content/viewpoint neutrality doctrine fails to grasp is the potential for the speaker's identity to be central rather than coincidental.

## II. ALTERNATIVE INTERPRETATIONS OF LIBERTY AND EQUALITY

Equality and expression were not always frozen into such starkly divergent doctrines. During the twenty years between the World War I Era speech cases, beginning in roughly 1918, and *Carolene Products* in 1938, the Court faced a barrage of cases in which government repression was directed against persons who were part of political or identity-based minorities or both. At the end of that time, with the enunciation in *Carolene Products*' famous footnote four of principles for judicial protection of personal liberties, the preceding cases were grouped into what have now become the two established prongs of heightened scrutiny under the Equal Protection Clause: violation of a fundamental right and discrimination against a suspect class. Although rightly celebrated as an intervention to protect a richer concept of freedom, footnote four is not without its downside. By its categorizations, footnote four drove a wedge into the development of a far more dynamic interplay of conceptions of liberty and equality.

### A. Footnote Four

Rare is the law student who finishes even the first year without learning of U.S. law's most famous footnote. In *Carolene Products v. United States*,<sup>92</sup> the Court announced that it would henceforth defer to legislative judgment on matters of economic regulation. In so doing, however, it reserved the authority to exercise more

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<sup>92</sup> *United States v. Carolene Prods Co.*, 304 U.S. 144, 152 n.4 (1938).

searching judicial scrutiny of statutes affecting personal, rather than economic, liberty. The Court suggested that three categories of laws would be reviewed non-deferentially. The first was legislation that "appear[ed] on its face" to violate "a specific prohibition of the Constitution." Second was "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Lastly, the Court singled out "statutes directed at particular religious, or national, or racial minorities" that were tainted by "prejudice against discrete and insular minorities."

In support of each of these clauses in the footnote, the Court cited a series of cases. One might suppose that the citations would track the clauses, i.e., that the cases cited for the "political processes" clause would not implicate "prejudice" concerns and that the cases cited for the "prejudice against minorities" clause would invoke doctrines concerning group-based prejudice. The reality is not nearly so simple.

Only two cases cited in the minorities clause rely on equality principles for their holdings: *Nixon v. Herndon*<sup>93</sup> and *Nixon v. Condon*<sup>94</sup>. Those are also the only cases cited in support of both the equality and the political processes propositions. In essence, they were one dispute, sequential lawsuits growing out of the refusal of the Texas Democratic Party to allow African-Americans to vote in primaries.

None of the other four cases cited in support of the "minorities" clause speaks of "minorities" or "prejudice," nor does any rely on equality for its holding. They concerned laws regulating private schools—either a total prohibition of such schools or the prohibition of the teaching of certain languages.<sup>95</sup> In each, the Court's reasoning focused on the self-determination rights of individuals, specifically that of parents to direct the upbringing of their children and, to a lesser extent, that of teachers of modern languages to practice their profession.<sup>96</sup> Two of them—*Pierce v. Society of Sisters* and *Meyer v. Nebraska*—are routinely cited as the beginning point of judicial recognition of a substantive due process right of privacy.<sup>97</sup> One would be

<sup>93</sup> 273 U.S. 536 (1927).

<sup>94</sup> 286 U.S. 73 (1932).

<sup>95</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>96</sup> The only hint of equality talk in any of them is in *Meyer v. Nebraska*: "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." 262 U.S. at 401. The holding, however, is based on defining liberty within the meaning of the Due Process Clause as including the right of the individual to control the upbringing of his children. *Id.* at 400–01. Justice Holmes dissented:

We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue. . . . I am not prepared to say that it is unreasonable to provide that in his early years [a child] shall hear and speak only English at school.

*Id.* at 412.

<sup>97</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1318–19 (2d ed. 1988):

hard pressed to find either cited today in support of equality-based protection from prejudice against minorities.

Thirdly, among the cases cited in support of the “political processes” clause were a subset cited as providing examples of legislation interfering with “political organizations,” including *Stromberg*, *Fiske*, *Whitney*, and Justice Holmes’s dissent in *Gitlow*. What is remarkable here is that these are the very cases decided upon the most individualistic concepts of liberty. Although they were cited in footnote four as concerning groups, their holdings had betrayed no hint of that. The holdings in these cases had not even alluded to the significance of political organizations qua organizations, nor was the fact that the defendants were targeted because of their group affiliations seen as a weakness in the state’s position. What the holdings had concerned—the First Amendment—logically should have placed these citations in the first clause of footnote four, the constitutional text clause. So it is all the more remarkable that, with one exception (*Stromberg* was cited in both clauses), they appeared instead as examples of protection for groups.

The reasons for the seeming mismatch between propositions and authorities may lie in the turbulent political dynamics of that era, dynamics that had a profound impact on the law. Footnote four was more than a down payment on the duty to protect civil liberties, as we tend to read it today. Footnote four marked a moment of both possibility and reification. In it, equality concepts broader than race gelled for the first time, as was evident in its reliance on the term “minority,” one of the first times that generic concept appeared in American law.<sup>98</sup> And it acknowledged the connection between group affiliation and suppression of speech, suggesting for the first time a right of “political organizations.” Yet it also provided what would become the touchstone for an increasingly rigid mechanization of equality analysis.

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Both *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, nearly always cited in tandem, have remained durable and fertile sources of constitutional doctrine concerning the nature of liberty, the respective rights of social institutions, and the limits of governmental power to homogenize the beliefs and attitudes of the populace.

*Id.* See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 654–55 (1997).

Alternatively, they might be read as byproducts of speech rights. Justice Harlan, writing in 1961, opined that “today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience.” *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

<sup>98</sup> Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1299 (1982).



## B. *The New Concept of Equality*

Writing almost a dozen years before *Carolene Products*, Justice Holmes described equal protection as “the usual last resort of constitutional arguments.”<sup>99</sup> In his influential analysis decades later, Gerald Gunther noted that until 1960, few courts relied on the equality doctrine unless the issue was race.<sup>100</sup> How then can the Court’s broader appreciation of the dynamics of prejudice in footnote four be reconciled with its continuing reluctance after *Carolene Products* to invoke the equal protection clause when it confronted unfair treatment of other discrete and insular minorities?

Certainly the overwhelming reason for the acknowledgment of prejudice was the world around them. Hitler’s rise to power, the Scottsboro trials, and the execution of Sacco and Vanzetti all occurred in roughly the decade preceding the Court’s decision in *Carolene Products*.<sup>101</sup> Moreover, the focus of oppositional politics had begun its shift from ideology to identity. The wave of identity-based politics was beginning to swell at precisely the moment that the wave of left-based politics was receding.

Central to this shift, especially in the law, was the National Association for the Advancement of Colored People (NAACP). Formed in 1909, the NAACP became the first source of organized and persistent equality claims to come before the

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<sup>99</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>100</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>101</sup> The Scottsboro case involved the convictions of nine African-American youths for raping two white women in Alabama in 1931. The case became infamous because it combined the elements of an increasingly obvious frame-up and “prejudice against minorities.” See generally DAN CARTER, *SCOTTSBORO* (1969). The series of trials, convictions, reversals, retrials, repeated convictions, and appeals lasted six years. In the process, three cases made their way to the Supreme Court prior to *Carolene Products*: *Patterson v. Alabama*, 294 U.S. 600 (1935); *Norris v. Alabama*, 294 U.S. 587 (1935); and *Powell v. Alabama*, 287 U.S. 45 (1932). In 1937, the state of Alabama dropped charges against four of the defendants; the last of the imprisoned defendants was released in 1950.

Nicola Sacco and Bartolomeo Vanzetti were Italian-American anarchists who were convicted of murder and robbery in 1920. See generally ROBERTA STRAUSS FEUERLICHT, *JUSTICE CRUCIFIED: THE STORY OF SACCO AND VANZETTI* (1977). This case, too, combined prosecution of ethnic and political minorities with questionable evidence. After the conviction, there was a prolonged campaign, first for reversal and then for clemency, involving such notables and friends of the Justices as Felix Frankfurter (who became a Justice in 1939). *Id.* at 277–408. Justice Brandeis even allowed Sacco’s wife to use his Dedham, Massachusetts home during the trial. *Id.* at 399. The two were executed in 1927. *Id.* at 409.

It was the rise of Hitler and the realization that racism in the United States was comparable in its extremism and philosophy to Hitler’s anti-Semitism, however, that led to the greatest impact on public opinion, mobilizing opposition to segregation. PHILIP A. KLINKNER with ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 137–43 (1999).

Court.<sup>102</sup> Its initial foray into the Court occurred within a year after its founding,<sup>103</sup> and by 1917 lawyers affiliated with the NAACP had won two major cases.<sup>104</sup> By the time of *Carolene Products*, the organization had appeared before the Court in at least ten additional cases.<sup>105</sup> Even more dramatically, especially to the Court, in 1930 the NAACP garnered enormous public attention for a lobbying campaign that was a key factor in defeating a Supreme Court nominee. The NAACP successfully opposed the nomination of Fourth Circuit Judge John J. Parker for the Supreme Court, on the basis of his endorsement of grandfather clauses, poll taxes and literacy tests.<sup>106</sup> Parker

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<sup>102</sup> See generally CHARLES FLINT KELLOGG, *NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE* (1967); MINNIE FINCH, *THE NAACP: ITS FIGHT FOR JUSTICE* (1981); HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* (1978).

<sup>103</sup> See KELLOGG, *supra* note 102, at 57–60 (describing *Franklin v. South Carolina*, 218 U.S. 161 (1910), in which the Supreme Court upheld the murder conviction of a South Carolina Black man).

<sup>104</sup> See *id.* at 184–86, 205–06 (describing *Buchanan v. Worley*, 245 U.S. 60 (1917), in which the Supreme Court held a Kentucky residential segregation ordinance violated the Due Process Clause of the Fourteenth Amendment, and *Guinn v. United States*, 238 U.S. 347 (1915), in which the Supreme Court held Oklahoma's "grandfather clause" violated the Fifteenth Amendment).

<sup>105</sup> See FINCH, *supra* note 102, at 71 (describing *Nixon v. Herndon*, 273 U.S. 536 (1927), in which a Texas statute denying a Negro the right to vote in a primary election was found to violate the Fourteenth Amendment, and *Nixon v. Condon*, 286 U.S. 73 (1932), in which it was held that denying Negroes the right to vote at a primary election violated the Fourteenth Amendment and those affected could sue for damages); KELLOGG, *supra* note 102, at 242–45 (describing *Moore v. Dempsey*, 261 U.S. 86 (1923), which reversed the denial of writ of habeas corpus filed by five Negroes convicted of murder); See also FINCH, *supra* note 102, at 46 (describing *Corrigan v. Buckley*, 271 U.S. 323 (1926), which held the Supreme Court did not have jurisdiction to hear appeal of a suit to enjoin the sale of property to a Negro pursuant to an indenture); *Id.* at 72 (describing *Grover v. Townsend*, 295 U.S. 45 (1936), in which the exclusion of a Negro from a primary election under resolution of Texas state Democratic Convention limiting membership in party to White citizens was held constitutional); SITKOFF, *supra* note 102, at 227 (describing *Hollins v. Oklahoma*, 295 U.S. 394 (1935), where the Court reversed a rape conviction on the ground that no African-Americans had ever served on juries in the county where defendant was prosecuted). The NAACP also brought or participated in *Harmon v. Taylor*, 273 U.S. 668 (1926) (arguing successfully that a New Orleans residential segregation statute was unconstitutional), *City of Richmond v. Deans*, 281 U.S. 704 (1930) (arguing successfully that a Virginia zoning ordinance that prevented a person from residing in an area occupied mainly by those with whom intermarriage is forbidden was unconstitutional), and *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding by the Court that a confession obtained by police through the use of coercion and brutality is inadmissible). One additional pre-*Carolene Products* case, *Hale v. Kentucky*, 303 U.S. 613 (1938), which involved race-based exclusions from jury service, is included in a list of "NAACP Legal Defense Cases Before the Supreme Court" that is Appendix B in JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 402 (1959).

<sup>106</sup> KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER (1990). Organized labor also campaigned against Parker, but according to *The Atlanta Constitution*, "[t]he number who voted against Judge Parker because organized labor opposed him

was defeated by a vote of thirty-nine to forty-one.<sup>107</sup> During this period, the NAACP became the largest equal rights organization in the United States—between World War I and World War II, the number of its state chapters multiplied ten-fold.<sup>108</sup> By 1939, it had 54,000 members.<sup>109</sup> One historian summarized the decade as follows: “In the 1930s, the black struggle became professionalized.”<sup>110</sup>

The Court’s official recognition of systemic prejudice was episodic, however, and hobbled by several political and doctrinal concerns. The problems of race confronted the Court at each turn. The Court’s acceptance of segregation and its retreat from a Reconstruction Amendment–based project of racial equality no doubt delayed the possibility of extending any concept of equality, because if it applied only weakly as to race, it could hardly apply at all beyond that. In that respect, footnote four signaled that the Court had grown uncomfortable with the formal limitation of equality to race alone.

Yet there was a bigger structural impediment in equality law. The legal discourse of race rested at that time on the distinction between political and social rights. Such abominations as *Plessy v. Ferguson*<sup>111</sup> turned on the Court’s acceptance of the argument that the Fourteenth Amendment guaranteed equal protection only in the political realm and in courts.<sup>112</sup> The states were free to mandate segregation (as opposed to inequality) because integration marked the point at which equal treatment became forced association.<sup>113</sup> The Court did not seem ready in 1938 to jettison the political rights/social rights distinction.

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perhaps was slightly smaller than the number who voted against him because of the opposition of Negro leaders.” *Id.* at 48–49. Perhaps *The Atlanta Constitution* was more focused on race than on labor politics. Nonetheless, the Parker confirmation fight may mark a singular moment in the shift from labor to identity politics. Writing in 1939, William H. Hastie, who later became a federal judge, wrote:

That victory and the subsequent defeat of [s]enators who had voted to confirm the Parker nomination probably impressed the nation more than any other thing accomplished by the American Negro during the 20th century. For years to come it will remain fresh and persuasive in the minds of . . . all aspirants to Federal Office.

*Id.* at 35–36.

<sup>107</sup> *Id.* at 31.

<sup>108</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 124 (1974).

<sup>109</sup> KLINKNER, *supra* note 101, at 144.

<sup>110</sup> SITKOFF, *supra* note 102, at 295.

<sup>111</sup> 163 U.S. 537 (1896) (holding that “separate but equal” transportation facilities did not violate the Equal Protection Clause).

<sup>112</sup> *Id.* at 544–45.

<sup>113</sup> For discussion on the political/social rights distinction, see John P. Frank and Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 131 (1950) and Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

As a result, nothing in footnote four disturbed that distinction. Also, the political/social rights distinction may help explain why the only two cases concerning race that were cited also supported the political processes clause. By those citations, the Court implicitly cabined race equality claims to issues such as voting rights. In the three school cases that were cited, which arguably went beyond political rights, the Court had not discussed the political/social rights distinction because it had not discussed equal protection. Thus, nothing in the "prejudice against minorities" clause of footnote four contradicted the limitations on equality law that had been established in the race cases. The text of footnote four silently perpetuated the political/social rights distinction.

However, the *logic* of the prejudice clause was not limited to political rights. The rationale was to protect minorities—groups of persons—who were vulnerable to majoritarian hostility, thereby addressing a failure in the political processes of lawmaking that could apply equally to all substantive rights. If animus toward certain minorities was the primary evil, that would call into question a potentially much larger number of discriminatory laws, both because such laws were not limited to race issues and because they mandated exclusion as well as inequality, i.e. ventured across the political/social divide. Footnote four presaged the first crack in the wall of segregation, which came less than a year later in a ruling that Missouri State University had to integrate its law school.<sup>114</sup>

If we examine the cases prior to *Carolene Products* in which the Court had expressed its discomfort with the hostile treatment of minorities, we see that the focus was on animus.<sup>115</sup> One large category of such cases consisted of appeals from criminal convictions, where police brutality, lynch mobs, and racial or ethnic opprobrium permeated the facts.<sup>116</sup> Justice Holmes, in a letter written just after he had denied a stay of execution for Sacco and Vanzetti, noted that the world was "stirred up" about the case. "I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them."<sup>117</sup>

Among the "thousand-fold cases" were many involving criminal law. In only one, *Strauder v. West Virginia*,<sup>118</sup> did the Court rely on equality principles. In *Strauder*, the Court established the principle that African-Americans could not be explicitly excluded by statute from jury rolls, a holding that fell within the political rights category.<sup>119</sup> In other cases, including all three resulting from the Scottsboro

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<sup>114</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>115</sup> See generally Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 26–32 (1942).

<sup>116</sup> *Id.* at 26–30.

<sup>117</sup> Oliver Wendell Holmes, Jr., to Harold Laski, 2 HOLMES-LASKI LETTERS 974 (M. Howe ed. 1953) (letter of Aug. 24, 1927).

<sup>118</sup> 100 U.S. 303 (1879).

<sup>119</sup> *Id.* at 310.

trials, the Court mentioned equality concerns, sometimes in oblique ways, but did not create precedents for equality law.<sup>120</sup>

Thus, during most of the pre-*Carolene Products* period, the Court failed to develop coherent principles as to the effects of “prejudice against minorities” in the criminal cases just as it had in the speech cases. Perhaps the most significant exception to this emerged from a famous reversal. Over a dissent by Justice Holmes, the Court in 1915 declined to order a new trial in the case of Leo Frank, the defendant in an openly anti-Semitic prosecution for murder, on the ground that federal courts lacked the authority to second-guess state court judgments on whether a trial proceeding was fair.<sup>121</sup> The Court radically shifted position in 1923, permitting de novo federal habeas corpus review of state court verdicts where the facts showed mob pressure.<sup>122</sup> *Moore* involved a group of African-American sharecroppers in Arkansas who had been sentenced to death for the murder of a White man during a race riot. The cases, however, continued to come to the Court.

Another large category of animus-driven cases involved aliens. Some of the Court’s earliest invocations of the Equal Protection Clause had been in alien cases involving local customs officials who demanded “bond” payments for Asians entering the country.<sup>123</sup> Had the plaintiffs “been subjects of the Queen of Great Britain,” the Court noted, there would have been quite a different response to the policy.<sup>124</sup>

In *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance regulating laundries that was enforced in such a way as to put Chinese-owned laundries out of business.<sup>125</sup> The decision can be read as relying on two ideas for extending racial equality protection beyond African-Americans. In one approach, the Court stuck to its focus on the extreme “personal and arbitrary power” of the officials’ actions.<sup>126</sup> “[T]he very idea that one man may be compelled to hold his life, or the

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<sup>120</sup> See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (invalidating a coerced confession); *Aldridge v. United States*, 283 U.S. 308 (1931) (upholding the rights of a defendant to conduct voir dire on whether potential jurors were prejudiced in a way that would prevent an impartial verdict).

<sup>121</sup> *Frank v. Mangum*, 237 U.S. 309, 349 (1915). In June, 1915, Governor John M. Slaton of Georgia commuted Frank’s sentence to life imprisonment. Two months later, a mob kidnapped Frank from prison and lynched him. LEONARD DINNERSTEIN, *THE LEO FRANK CASE* 126, 138–41 (1968). See also Eric M. Freedman, *Leo Frank Lives: Untangling the Historical Roots of Meaningful Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1474–97 (2000).

<sup>122</sup> *Moore v. Dempsey*, 261 U.S. 86 (1923). See generally RICHARD C. CORTNER, *A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES* (1988); Freedman, *supra* note 121, at 1502–30.

<sup>123</sup> *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

<sup>124</sup> *Chy Lung*, 92 U.S. at 279.

<sup>125</sup> 118 U.S. 356, 373–74 (1886).

<sup>126</sup> *Id.* at 370.

means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be . . . the very essence of slavery.”<sup>127</sup>

The second approach was the Court’s first articulation of the generic concept of group animus as an infection of justice. The Court found that the law was applied by “public authorities . . . with a mind so unequal and oppressive” as to effectively deny equal protection of the law.<sup>128</sup> It ruled that even a facially neutral law applied “with an evil eye and an unequal hand” could violate the Constitution, where only “hostility to the race and nationality to which the petitioners belong[ed]”<sup>129</sup> could explain the policy.

In most of the alien cases that followed *Yick Wo*, however, the Court emphasized the first approach—that of intervention by the Court only where there was extreme arbitrariness. The resulting doctrine of accepting any rational basis for a classification led to nonsensical results. The Court upheld laws prohibiting aliens from operating pool and billiard halls,<sup>130</sup> purchasing land,<sup>131</sup> securing jobs on public works projects<sup>132</sup> and even obtaining licenses to kill wildlife for sport.<sup>133</sup> In each case, the Court ruled that the classification was “not irrational,” and was thus constitutional, often without stating a reason.<sup>134</sup> As Justice Holmes said in *Patsone v. Pennsylvania*, “if we might trust popular speech,” we can presume aliens to be “the peculiar source of evil,” but it was unnecessary to reach that point because of deference to the state legislature.<sup>135</sup>

Historically, one justification for discriminatory treatment of aliens was the belief that disloyalty was linked to alienage.<sup>136</sup> The conflation of this rationale with racism reached its apex when the Supreme Court upheld “evacuation” orders issued in 1942 that applied to all persons of Japanese ancestry, whether U.S. citizens or not, while applying to residents of German or Italian ancestry only if those persons had not

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 373.

<sup>129</sup> *Id.* at 373–74.

<sup>130</sup> *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927).

<sup>131</sup> See, e.g., *Cockrill v. California*, 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

<sup>132</sup> *Crane v. New York*, 239 U.S. 195 (1915).

<sup>133</sup> *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

<sup>134</sup> The one exception to this pattern was *Truax v. Raich*, 239 U.S. 33 (1915), in which the Court invalidated an Arizona law that required all employers of more than five workers to limit employment of non-citizens to twenty percent of their workforce. The Court found that the law denied aliens the ordinary means of earning a livelihood because of race or nationality.

<sup>135</sup> *Patsone*, 232 U.S. at 144.

<sup>136</sup> *Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 376 (1949).

become citizens.<sup>137</sup> In effect, the law allowed a viewpoint—the presumption of disloyalty—to so define the identity of Japanese-Americans as a group that it literally erased the acts of those persons in acquiring U.S. citizenship.<sup>138</sup>

However, in the post-war, civil rights movement era, the balance shifted—alienage became a suspect classification.<sup>139</sup> Equality became the rule. Linking alienage to beliefs became the exception, which fully emerged when the Court created the “political community” rationale for the disqualification of aliens from certain jobs, such as public school teachers, on the ground that employees in those positions perform governmental functions such as training citizens and perpetuating national values.<sup>140</sup> The ambivalent status of equality rights for aliens, which remains today, embodies the expression-equality dichotomy.

### C. *Complications of Expression and Equality*

If one impact of footnote four was the broadening of the scope of prejudice concerns, another was the articulation of discrimination as an independent defect in laws that fell under the constitutional text and political processes clauses of the footnote. The footnote suggested, at a minimum, that laws regulating political organizations, even if not so repressive as to run afoul of the political processes paragraph, might fall if seriously scrutinized as based on anti-minority prejudice.<sup>141</sup> On this understanding, the “discrete and insular minorities” language might well have been applied to the political groups that were targets of state persecution in that era. But on this point, too, the Court danced to the edge of a much broader reading of equality, and stopped short.

The convergence of the two strands occurred near the height of the Red Scare. Attorney General Palmer’s report on radical propaganda issued in November 1919 included a section on “radicalism and sedition among Negroes” that took aim at the NAACP’s official journal, *The Crisis* (edited by W.E.B. DuBois), by describing a journal “always antagonistic to the white race and openly, defiantly assertive of its

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<sup>137</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>138</sup> “Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . .” *Korematsu*, 323 U.S. at 223 (emphasis omitted).

<sup>139</sup> *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>140</sup> *Ambach v. Norwick*, 441 U.S. 68 (1979).

<sup>141</sup> That concept did generate legislation. Three states, the District of Columbia, and the Virgin Islands currently have statutes that prohibit discrimination based on political party or affiliation. See CAL. LAB. CODE §§ 1101–02 (1989); D.C. CODE ANN. § 1-2512 (1999); NEV. REV. STAT. 281–370 (1999); VT. STAT. ANN. tit. 21, § 1726 (1999); and 10 V.I. CODE ANN. § 64 (2000).

own equality and even superiority.”<sup>142</sup> Two bills were introduced in Congress in 1920 which sought to deny postal privileges to publications appealing to racial prejudice with the intent to bring about violence, but neither passed.<sup>143</sup> The World War I Era of attacks on leftist organizations ended without repression of race-based organizations.

Just one year before *Carolene Products*, however, the Court received a case in which race and expression overlapped. In *Herndon v. Lowry*,<sup>144</sup> Georgia prosecuted an African-American field organizer for the Communist Party under its law prohibiting incitement to insurrection. By one vote, the Court reversed Herndon’s conviction, ruling that the statute was impermissibly vague in its description of which acts were prohibited and thus was distinguishable from the statute upheld in *Gitlow*.<sup>145</sup> The Court also found unconstitutional the punishment of a speaker for the acts of listeners committed at any later time when it would be reasonable for the speaker to expect his influence to directly induce those acts.<sup>146</sup>

In bringing the case, Georgia “especially relie[d] upon a booklet entitled ‘The Communist Position on the Negro Question,’ on the cover of which appears . . . the phrase ‘Self-Determination for the Black Belt.’”<sup>147</sup> The four dissenting members of the Court found the First Amendment reasoning implausible, assuming that *Gitlow* was still good law and stating:

It should not be overlooked that Herndon was a negro member and organizer . . . and was engaged actively in inducing others, chiefly southern negroes, to become members of the party and participate in effecting its purposes and program. . . . Proposing these measures was nothing short of advising a resort to force and violence, for all know that such measures could not be effected otherwise.<sup>148</sup>

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<sup>142</sup> KELLOGG, *supra* note 102, at 288–89.

<sup>143</sup> *Id.* at 289.

<sup>144</sup> 301 U.S. 242 (1937).

<sup>145</sup> *Id.* at 256, 268.

<sup>146</sup> *Id.* at 261–63.

<sup>147</sup> *Id.* at 250–51.

To the state, the Communist theory of “self-determination of the Black Belt” was a particularly incendiary doctrine. While jurors viewed a map showing those areas of the South that would fall under black political control should the plan be implemented, [the assistant prosecutor] read lengthy passages explaining the theory, which he regarded as a serious threat to the state of Georgia.

CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* 45–46 (1976).

<sup>148</sup> *Gitlow*, 301 U.S. at 275–76. That was indeed the explicit reasoning of one of the lower courts in *Gitlow*. “[N]o sane man could expect” that property owners would

give[] up to a proletarian mob without the use of force or violence. . . . When people combine and advocate such doctrines, there must necessarily be great latitude for reading between the lines to



The majority rebuffed suggestions from both conservatives and liberals, and ignored the impact of the speaker's racial identity and the racial dynamics behind the case. As a consequence, the holding rendered it a pure speech case and also completely deraced it. The power of race, however, could not have escaped the Court's notice, even if it escaped their mention.<sup>149</sup> Herndon's lawyer framed the case in racial terms in his closing argument: "The only charge against Herndon was his race, [the lawyer] asserted . . . ."<sup>150</sup>

#### D. *Gobitis v. Barnette*

After the articulation in footnote four of prejudice concerns as independent of political process interference concerns, the thin line between state persecution of racial or ethnic groups and the persecution of voluntarist ideological groups had grown thinner. How should the law handle cases involving dissenters who were also targeted as members of a distinct social minority? The options for analysis played themselves out soon after *Carolene Products* in a famous pair of cases involving Jehovah's Witnesses and the flag salute.<sup>151</sup>

In *Minersville School District v. Gobitis*, the Court upheld a mandatory flag salute statute in a decision which virtually pitted opinions invoking the political interference clause and the prejudice clause against each other.<sup>152</sup> Justice Frankfurter, for the Court, ruled that such a statute imposed no significant burdens on Jehovah's Witnesses' rights of free expression and free conscience because they established no barriers to that group seeking redress through the legislative process.<sup>153</sup> Although adherents taught their children that the flag salute violated their religious duties, Frankfurter wrote that a mandatory salute did not prevent the group from continuing to believe as they wished.<sup>154</sup>

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determine what is implied . . . and they should be held responsible for advocating what they [know] . . . will be essential to the accomplishment of their purpose.

State v. Gitlow, 187 N.Y.S. 783, 803 (1921).

<sup>149</sup> The record of the case left no doubt as to the racial nature of the prosecution. One state witness referred to the defendant as a "darkey," which the state supreme court ruled was "not opprobrious" and thus not in error. *Herndon v. State*, 174 S.E. 597, 609 (Ga. 1934). A White witness for the defense was asked, "Do you understand the Communist position [on] equal rights for negroes to mean the right of a colored boy to marry your daughter, if you have one?" This question was also found not to be in error. *Id.* at 605.

<sup>150</sup> MARTIN, *supra* note 147, at 58.

<sup>151</sup> See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>152</sup> *Gobitis*, 310 U.S. 586 (1940).

<sup>153</sup> *Id.* at 600.

<sup>154</sup> *Id.*

Justice Stone, author of footnote four, argued in dissent that the mandate violated both the constitutional text and the prejudice clauses of the footnote.<sup>155</sup> The religious nature of the organization placed it within the scope of the First Amendment for protection of its refusal to engage in the salute. Stone did not stop there, however, as he could have, but referred to that group as a “small and helpless minority,” a “politically helpless minorit[y]”—within the meaning of the prejudice clause.<sup>156</sup>

The Court reversed *Gobitis* three years later, in *West Virginia State Board of Education v. Barnette*.<sup>157</sup> The opinion of the Court, written by Justice Jackson and joined by Justice Stone, virtually ignored the prejudice clause. Instead, in broad and ringing rhetorical strokes, the Court protected the group’s refusal to salute the flag under a freedom of conscience interpretation of the First Amendment. Justice Jackson, for the court, held that the freedom of conscience was not limited by or to the religious context of the case.<sup>158</sup> Justice Stone, author of footnote four and of the *Gobitis* dissent which had stressed the minorities issue, did not write separately. Thus, the opinion of the Court in *Barnette* settled on the primacy of expression over equality/prejudice concerns, with expression framed as an anti-orthodoxy concept.

The choice of the two possible rationales was presented in the amicus briefs filed in the case. The American Bar Association’s Committee on the Bill of Rights filed a brief framing the case as about “the impairment of religious liberty.”<sup>159</sup> Among the individuals who signed the brief was Zechariah Chafee, Jr., the most influential First Amendment scholar of the time.<sup>160</sup> The American Civil Liberties Union filed an amicus brief which characterized the case as one “involving minorities” and specifically cited the prejudice against minorities clause of footnote four.<sup>161</sup> In essence, the Court opted for the analysis of the ABA, rather than the ACLU.

I do not wish to fall into the trap that I criticize, of painting the dichotomy too starkly or simplistically. Two Justices who did concur in *Barnette*—Black and Douglas—wrote to explain their change of heart, both having joined Frankfurter’s opinion for the Court in *Gobitis*. Their *Barnette* concurrence rests squarely on freedom of religion grounds, objecting to a coerced pledge of allegiance both as a “test oath” and as “a handy implement for disguised religious persecution.”<sup>162</sup> It thus repeats, although only implicitly and without attribution, the two aspects of Justice Stone’s *Gobitis* dissent. The equality theme registered more prominently in a

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<sup>155</sup> *Id.* at 601, 606.

<sup>156</sup> *Id.* at 604, 606.

<sup>157</sup> 319 U.S. 624 (1943).

<sup>158</sup> *Id.* at 634–35.

<sup>159</sup> Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends [of] the Court at 3, 25, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591).

<sup>160</sup> See Chafee, *supra* note 10.

<sup>161</sup> Brief for American Civil Liberties Union, *Amicus Curiae*, at 16, *W. Va., State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591) [hereinafter ACLU Brief].

<sup>162</sup> *Id.* at 644.

precursor to that concurrence, a Jehovah's Witnesses case decided a year earlier in which Justices Black and Douglas, joined by Justice Murphy,<sup>163</sup> announced their new position on flag salutes.<sup>164</sup> That opinion referred to "the free exercise of a religion practiced by a minority group" and the duty of a democratic government "to accommodate itself to the religious views of minorities, however unpopular and unorthodox."<sup>165</sup>

Thus, although the language and theme of "prejudice against minorities" did not disappear entirely from expression-related cases in the period between *Gobitis* and *Barnette*, *Barnette* appears to mark the moment when the Court backed off the possibility of more fully melding the two. Having available the tripartite structure of footnote four, the Court opted to categorize the flag salute issue within the umbrella of the first, constitutional-text clause of that footnote. Although it is impossible to know exactly why this happened, the nature of the Jehovah's Witnesses, the lingering effects of Progressive-Era liberalism, and Justice Stone's concern for at least the appearance of judicial insularity may all provide at least a partial explanation.

The Witnesses are an evangelical, millenarian religion based on the Bible, but sharply critical of all prior Christian faiths, especially the Roman Catholic Church.<sup>166</sup> They believe that a limited number of the righteous will reign with Christ in heaven after Armageddon. Their belief that these persons will be chosen without regard for nationality, together with their opposition to war in any form, helped land them in trouble during the red scares of the World War I Era. The group's legal counsel, Joseph Rutherford, served nine months in federal prison for sedition, a conviction that was reversed because of the trial judge's apparent bias against Jehovah's Witnesses.<sup>167</sup> Rutherford's own experience encapsulated the way that free speech claims by opponents to the war harbored equally strong anti-prejudice concerns.

In 1925, Rutherford, then president of the group, called for a period of aggressive proselytizing war against Satan, which lasted until Rutherford's death in 1942.<sup>168</sup> The group became known for its aggressive sidewalk and door-to-door preaching and its sale of literature, as well as its negative campaign (to use current terminology) against

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<sup>163</sup> Justice Murphy also wrote separately and alone in *Barnette*, but his concurrence contained no flavor of the prejudice concern, instead stressing "the right of freedom of thought and of religion as guaranteed by the Constitution." *Id.* at 645.

<sup>164</sup> *Jones v. Opelika*, 316 U.S. 584 (1942) (Black, Douglas, and Murphy, JJ., dissenting).

<sup>165</sup> *Id.* at 623–24.

<sup>166</sup> Descriptions of the faith's beliefs are drawn from ERIC MICHAEL MAZUR, *THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER* (1999), and SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000).

<sup>167</sup> *United States v. Rutherford*, 258 F. 855 (2d Cir. 1919); see generally MAZUR, *supra* note 166, at 31–35.

<sup>168</sup> MAZUR, *supra* note 166, at 36–37.

other Christians.<sup>169</sup> Local governments used a variety of laws to prevent Witnesses from proselytizing, including state laws against sedition<sup>170</sup> and ordinances prohibiting or requiring license fees for certain activities on public streets.<sup>171</sup> From 1933 to 1936, arrests increased over four hundred percent, from 268 to 1,149.<sup>172</sup> In 1935, the group re-opened its in-house legal office.<sup>173</sup> By 1937, a remarkable number of cases involving the Jehovah's Witnesses began appearing on the Supreme Court's docket, resulting in twenty-three opinions in the following decade.<sup>174</sup>

The data as to arrests and lawsuits understate the enormous animus toward the group, however. In the early and mid-1940s, at the height of the patriotic response to World War II and in the immediate aftermath of the Court's decision upholding a compulsory flag salute in *Gobitis*, hundreds and perhaps thousands of Witnesses were physically attacked, often by mobs.<sup>175</sup> Local police frequently failed to protect them, and sometimes participated in the attacks.<sup>176</sup> Despite many requests to the Justice Department, there was no federal intervention to counter the vigilantism.<sup>177</sup> The animus carried over as well into incidents of job discrimination and denials of child custody.<sup>178</sup>

These attacks were well known. The American Civil Liberties Union filed as an appendix to its amicus brief in the case a report that it had published documenting incidents of violence against members of the group.<sup>179</sup> Justice Jackson's original draft of the Court's opinion in *Barnette* cited press reports of violence against the Witnesses.<sup>180</sup> Justice Stone prevailed upon him to remove several "rather too journalistic" footnotes, however, saying "that he was troubled by the impression that our judgment of the legal question [in *Barnette*] was affected by the disorders which

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<sup>169</sup> For a description of these methods, see *Douglas v. City of Jeannette*, 319 U.S. 157, 167–73 (1943).

<sup>170</sup> *E.g.*, *Taylor v. State*, 11 So.2d 663 (Miss. 1943); *McKee v. State*, 37 N.E.2d 940 (Ind. 1941); *Beeler v. Smith*, 40 F.Supp. 139 (E.D. Ky. 1941).

<sup>171</sup> *See, e.g.*, *Martin v. Struthers*, 319 U.S. 141 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

<sup>172</sup> MAZUR, *supra* note 166, at 41–42.

<sup>173</sup> *Id.* at 42.

<sup>174</sup> PETERS, *supra* note 166, at 13.

<sup>175</sup> *Id.* at 8–10; ACLU, *Jehovah's Witnesses and the War* 9–18 (1943), attached as Appendix B to ACLU Brief, *supra* note 161.

<sup>176</sup> Peters describes, in graphic detail, one such event in Imperial, Pennsylvania, in 1941. PETERS, *supra* note 166, at 1–8.

<sup>177</sup> *Id.* at 11.

<sup>178</sup> *Id.*

<sup>179</sup> *See* ACLU, *Jehovah's Witnesses and the War*, *supra* note 175.

<sup>180</sup> PETERS, *supra* note 166, at 251.

had followed the *Gobitis* decision.”<sup>181</sup> Jackson complied, and the final opinion contains a footnote citing only law review commentary critical of *Gobitis*.<sup>182</sup>

In short, the Jehovah’s Witnesses were a distinct social group that engendered prejudice based on their identity as a group, as well as resistance to what they had to say. Harry Kalven may have been writing tongue-in-cheek when he noted, “it would not be a bad summary of . . . three decades of First Amendment issues in the Court to say simply: Jehovah Witnesses, Communists, Negroes,”<sup>183</sup> but he was on to more than he realized.

The Jehovah’s Witnesses cases generated the doctrinal home of the concept of viewpoint discrimination, the principle under which otherwise legitimate time, place and manner restrictions fail if they are directed against a particular viewpoint. In developing this body of case law, the Court relied solely on First Amendment principles, to the exclusion of prejudice clause concerns. As was also true with the seminal speech cases of the World War I Era, there was no acknowledgment of the inter-relating dynamics between expression and identity-based claims. Yet in all three of Kalven’s examples, both sets of concerns reinforced and indeed helped to constitute each other.

### III. DOCTRINAL INCOHERENCY: *R.A.V.*

The contemporary Supreme Court faced the equality/expression dichotomy most directly in *R.A.V. v. City of St. Paul*.<sup>184</sup> A St. Paul ordinance criminalized placing symbols, objects or graffiti, such as a burning cross or a Nazi swastika, on public or private property if one knew that such speech would “arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>185</sup> In *R.A.V.*, a group of adolescents had burned a cross on the front lawn of a home owned by an African-American family.<sup>186</sup> The Court unanimously held the ordinance to be facially unconstitutional. Although the Court could have grounded its holding solely on the ordinance’s overbreadth, as four Justices urged,<sup>187</sup> it went much further, apparently drawn by the siren song of the culture wars.

The ordinance was so overbroad that it could not have passed any First Amendment test. The chief argument made in its defense was a limiting construction: it could be limited to cover only fighting words, a subset of speech categorically

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<sup>181</sup> *Id.*

<sup>182</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 n.15 (1943).

<sup>183</sup> HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 135–36 (1965).

<sup>184</sup> 505 U.S. 377 (1992).

<sup>185</sup> *Id.* at 380.

<sup>186</sup> *Id.* at 379.

<sup>187</sup> *Id.* at 413.

excluded from First Amendment protection.<sup>188</sup> The Minnesota Supreme Court had construed the ordinance to cover only language that would constitute fighting words or incitement not protected by the First Amendment and to be invalid if applied to non-fighting words speech.<sup>189</sup> The Minnesota Supreme Court found this instance of cross-burning constituted fighting words.<sup>190</sup> Thus, the state supreme court then upheld it on the reasoning that if the entire category of fighting words is outside the shelter of the First Amendment, then the smaller portion which falls within the ambit of hate speech must also lack protection.<sup>191</sup>

In reversing, the Supreme Court held that racist speech could not be singled out for infringement on the basis of content.<sup>192</sup> Even an unprotected category of speech, the Court wrote, was not “invisible to the Constitution.”<sup>193</sup> The Court then defended the ideational value of hate speech:

It is not true that “fighting words” have at most a “de minimis” expressive content or that their content is *in all respects* “worthless and undeserving of constitutional protection,” sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute no *essential* part of any exposition of ideas.<sup>194</sup>

The Court then sharply shifted logical course and analogized fighting words to a “noisy sound truck: . . . ‘a mode of speech’ . . . [that] can be used to convey an idea.”<sup>195</sup> As with a sound truck, the Court reasoned, the government could not regulate its use based on the content of its message.<sup>196</sup> To do so, the Court held, penalized speech both on the basis of its content, by targeting only those fighting words that addressed certain disfavored topics, and on the basis of its viewpoint, in that pro-equality speakers could attack anti-equality advocates in harsh terms, but the reverse would not be permitted.<sup>197</sup>

The case presented a legal question framed in perfect alignment with the dichotomy. The answer to which side trumped appeared to the Court as self-evident as the dichotomy itself—thou shalt not tamper with the First Amendment’s “preferred

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<sup>188</sup> *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>189</sup> *In re: Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

<sup>190</sup> *Id.* at 510.

<sup>191</sup> *Id.*

<sup>192</sup> *R.A.V.*, 505 U.S. at 385.

<sup>193</sup> *Id.* at 383.

<sup>194</sup> *Id.* at 384–85 (citations omitted).

<sup>195</sup> *Id.* at 386.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 391–92.

position.”<sup>198</sup> The petitioner, asserting rights under the First Amendment, argued and the Court held that restrictions on speech are not a permissible method of fighting racial hatred.<sup>199</sup> City lawyers defending the ordinance argued that the state’s interest in achieving equality sufficed to justify an infringement on what was valueless speech.<sup>200</sup>

The decision confirmed the worst fears of the egalitarians. Not only did the Court protect racist speech as viewpoint at the expense of the equality goals of the ordinance, but it was the racist content of the speech that saved it. Expressions of hatred not linked to the protected characteristics would have been punishable as fighting words. As Justice White noted, this aspect of the holding seemed to announce that expressions of racial hatred “are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.”<sup>201</sup>

The logic of a sharp doctrinal border simultaneously led the Court in a confounding direction under the Equal Protection Clause, however. The Court explicitly backed off the equal protection basis for *Mosley*, characterizing the *Mosley* holding as an example of the “occasional[] fus[ing]” of the two doctrines, “with the acknowledgment . . . that the First Amendment underlies its analysis.”<sup>202</sup> The Court stated that while the ordinance could not selectively target speech based on viewpoint, “a prohibition of fighting words that are directed at certain persons or groups . . . would be facially valid if it met the requirements of the Equal Protection Clause.”<sup>203</sup> Under that logic, it is at least theoretically possible that a law could prohibit fighting words directed at persons *because of race*, but could not prohibit *racist words*.

Such a result seems bizarre, but it is consistent with an absolute separation between speaker and message and with the expression/equality dichotomy. All messages must be protected equally, but there is constitutional leeway to regulate groups of speakers based on the objects of their speech. The anomaly becomes more severe if one ventures beyond characteristics already denominated as suspect under the Equal Protection Clause. Fighting words directed at groups subject to heightened scrutiny would be more likely to be disallowed, while epithets based on other

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<sup>198</sup> The Court first referred to the “preferred place” of the First Amendment in *Thomas v. Collins*, 323 U.S. 516, 530 (1945). It had earlier described the First Amendment as “the matrix, the indispensable condition of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). That sentiment has become a generally accepted tenet of constitutional law. Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 430–31 (1980).

<sup>199</sup> *R.A.V.*, 505 U.S. at 391.

<sup>200</sup> *Id.* at 395.

<sup>201</sup> *Id.* at 402.

<sup>202</sup> *Id.* at 384 n.4.

<sup>203</sup> *Id.* at 392 (emphasis omitted).

characteristics, such as physical or mental disability or sexual orientation, would be less likely to be punishable. The result would be that speech attacking groups who are least protected under existing law would be allowable, while the groups most protected from invective would be those already having the most equality protection. It seems a strange result for a regime dedicated to sheltering dissent.

The confusion between content and identity arose in two other points in the decision. Justice Stevens accused Justice Scalia of getting the basic distinction wrong.<sup>204</sup> Scalia used the examples of two hypothetical epithets—Catholics [or “papists”] are scum and “anti-Catholic bigots” are scum—to illustrate viewpoint bias.<sup>205</sup> The first, he said, would be prohibited speech under the ordinances because it would castigate a religious group, hence provoking feelings “on the basis of religion”; the second would not be prohibited because it would attack an idea.<sup>206</sup> Stevens argued that Scalia was setting up the wrong comparison—the proper one, according to Stevens, was between “Catholics are scum” and “Muslims are scum.”<sup>207</sup> Stevens’ point was that all religious identifications were protected equally, and, thus, there was no viewpoint bias. Although Stevens is correct that “anti-Catholic bigots” cannot be equated with, for example, “Muslims,” he is surely wrong to miss the ideational content of the identity Catholic (or Muslim, etc.). If identifying yourself as Catholic stands for something, then the reasoning behind Scalia’s comparison, even if unarticulated, holds up. Neither opinion can do more than make incommensurable claims, however, because they each hold to the view that the game lies in picking either identity or viewpoint as the correct benchmark, rather than in seeing them as holistically merged.

The final instance of the identity/content confusion in *R.A.V.* arose in the exchange between Justices Scalia and White as to sexual harassment law. The two Justices argued over the application of the holding to hostile-environment sexual harassment claims. Justice Scalia asserted that such claims would not be barred because sexual harassment amounts to conduct, not speech. “Sexually derogatory ‘fighting words’ . . . [could] produce a violation of Title VII’s general prohibition against” discriminatory employment practices.<sup>208</sup> Thus, reasoned Justice Scalia, the singling out of sexually derogatory fighting words in that context is permissible because it falls within the “secondary effects” exception, where the conduct is penalized for reasons unrelated to the content or viewpoint expressed.<sup>209</sup>

Conversely, Justice White argued that the anti-discrimination law fails the *R.A.V.* test by singling out sexual content rather than by prohibiting all workplace harassment

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<sup>204</sup> *Id.* at 435.

<sup>205</sup> *Id.* at 391–92.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 435.

<sup>208</sup> *Id.* at 389.

<sup>209</sup> *Id.*



generally.<sup>210</sup> Both apparently accept that the target of this aspect of anti-discrimination law is sexual content, rather than speech harassing women. The multiple confusions in the Title VII doctrine caused by this conflation have been analyzed elsewhere.<sup>211</sup> In a subsequent opinion, the Court (in another opinion by Justice Scalia) takes the opportunity to recast hostile-environment law as not targeting sexual content.<sup>212</sup> However, the dichotomy-driven pitfall of missing the overlap, rather than missing the distinction, leads to a carving out of sexual harassment principles that is implausible and confusing.<sup>213</sup>

*R.A.V.* illustrates other incoherencies structured into the dichotomy. It is the particularity of the St. Paul ordinance that leads to its invalidation, yet the Court signals that it might permit other forms of particularity, so long as "ideas" were not regulated. Autonomy rights accrue to the speaker but not to the threatened family. The collective social good is framed as the interest behind the equality-driven ordinance, but ultimately justifies the protection of the individual racist. In the process, the racist comes to embody dissent and the African-American family in a predominantly White neighborhood represents conformity.

Thus, one incoherency is that the dichotomy produces a quick trumping based on the illusion of a neatly polarized scale of constitutional values rather than a series of overlapping and interconnected arguments. Another incoherency is the equivalence of anti-White and anti-Black hate speech. The *R.A.V.* result can be seen to exemplify the claim that seemingly neutral rules operate to reinforce bias, by distorting social reality and ignoring power imbalances.<sup>214</sup> In fact, *R.A.V.* illustrates how both sides in the dichotomized debate seek to tag the other with particularity, either of viewpoint or of unacknowledged hierarchy: who's orthodoxy, who's exclusion.

While I agree with its critics that neutrality is usually a chimera, I would argue that the result in *R.A.V.* is correct. The St. Paul ordinance was absurdly overbroad, and I do not accept that causing much anger, i.e., "fighting words," should be a constitutional substitute for the clearly impermissible standard of any anger that the ordinance contained. But *R.A.V.* is not justified because of a simple, easy trumping. The preferred position of the First Amendment is itself justified by many of the same principles that clearly buttress the social value of the equality of persons.

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<sup>210</sup> *Id.* at 409–10.

<sup>211</sup> See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

<sup>212</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>213</sup> See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Richard H. Fallon, Jr. *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 S. CT. REV. 1; and Eugene H. Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

<sup>214</sup> See Mari J. Matsuda and Charles R. Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (Mari J. Matsuda et al. eds., 1993).

Closer to my analysis is that of Steven Shiffirin, who faults *R.A.V.* within First Amendment terms, for violating a dissent-centered conception of the First Amendment.<sup>215</sup> Shiffirin argues that the First Amendment itself should be read to shelter not simply any speaker equally, but especially those speakers “who are out of power or lower in a hierarchy.”<sup>216</sup> On that understanding, a jurisprudence of expression is defective on its own terms if it is blind to imbalances of power, and if it fails to recognize that a measure designed to enhance the voice of disadvantaged dissenters has “a special claim to be heard under a dissent model of free speech.”<sup>217</sup>

Shiffirin’s argument captures the link between inequality and dissent, but its analytic power remains limited to an individualized model of expression. Shiffirin contextualizes the dichotomy by factoring in the social position of each speaker, but cannot reconcile it. “[W]e should not blink the tension between these amendments,” he concludes.<sup>218</sup>

There is an even more fundamental flaw, however, in distinguishing free speech and equal protection claims in the way that the Court does in *R.A.V.* The effect of and intention behind racist invective and invective directed at racial groups is the same. The fault line in the expression/equality dichotomy is the proposition that one can fully separate the two principles in the first place.

#### IV. THE MATRIX OF MULTICULTURALISM

On this set of issues, it is easy to hear the echoes of legal doctrine in broader political and cultural discourse. Beyond the realm of such doctrine, the debate over hate speech and other aspects of the expression-equality dichotomy have been conceptualized as involving the conflict between difference and dissent, models which emerged from competing sets of assumptions and values.

The politics of difference developed in part from a critique of the false neutrality of such principles as “free speech,” the core concept of dissent. Difference or identity politics seeks to reveal the unequal power that classical liberal theory often masks. It seeks to situate the self in a matrix in which the meanings of any given practice vary depending upon the point from which one views them. It also attempts to inscribe a richer concept of self, one that develops in the context of interaction with others.

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<sup>215</sup> Steven Shiffirin, *The First Amendment and the Meaning of America*, in IDENTITIES, POLITICS, AND RIGHTS 307 (Austin Sarat & Thomas R. Kearns eds., 1995). See also Steven H. Shiffirin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994); STEVEN H. SHIFFIRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 91 (1990) (“To promote dissent is ordinarily not to promote anomic individualism; to promote dissent is to promote engaged association.”).

<sup>216</sup> Shiffirin, *The First Amendment and the Meaning of America*, *supra* note 215, at 343.

<sup>217</sup> *Id.* at 344.

<sup>218</sup> *Id.*

By contrast, the law and politics of dissent reinforce the central assumptions of traditional liberalism—a validation of individualism and an emphasis on voluntary choices and concomitant responsibilities. The idea of dissent necessitates a sharp boundary between self and others. However, it is a neutral border; the preservation of “the autonomy of the speaker” is a, perhaps the, central value.<sup>219</sup>

While individualist speakers may be sacrosanct, they are also fungible. First Amendment law concerning dissent is founded on the principle that any speaker potentially can express any opinion, and that no individual’s right to speak should be contingent on any aspect of her identity. Individual, voluntary choices form the core of protected expressive activity.

The clash of equality and expression has manifested itself repeatedly in recent years, often in a cluster of issues grouped loosely as “multiculturalism.”<sup>220</sup> Proponents of multiculturalism have advocated an opening up of institutions such as the academy to new voices, most prominently voices of people of color and of women, associated with identity group politics. Multiculturalists assert that the old canonic assumptions and texts embodied a distinct, if invisible, racial and gender bias, and that only by reaching out to and bringing in these new, identity-inflected voices could such institutions be legitimate in a democratic culture.

Opponents of multiculturalism have often resisted this identity campaign with defenses of individualism. They perceived a threat that multiculturalism would suffocate robust and candid debate by a selective protectiveness toward these voices, justified because these voices were newly legitimized and thus politically fragile. Confrontations arose over the position of the state vis-a-vis the shielding of speech that was, alternatively, defensive of the status quo, bigoted or even hateful. In legal discourse, the issue of regulating hate speech has provided a prime context for the elaboration of the tension between expression and equality. This article will not recapitulate that debate, already extensively explicated and analyzed.<sup>221</sup> The first

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<sup>219</sup> See, e.g., Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civil Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

<sup>220</sup> There is an enormous literature, pro and con, on multiculturalism. Sympathetic accounts and overviews include Austin Sarat & Thomas R. Kearns, *Responding to the Demands of Difference: An Introduction*, in CULTURAL PLURALISM, IDENTITY POLITICS AND THE LAW 1–25 (Austin Sarat & Thomas R. Kearns eds., 1999); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); and MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994). Criticisms include TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995); NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW (1997); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (1992); and J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993 (1995).

<sup>221</sup> A modest sampling of the law review literature would include: Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42

relevant point here is that what both sides in this ongoing debate agree on, virtually without challenge, is the stability of the dichotomy itself.<sup>222</sup>

The second relevant point is that, on that question at least, they are both wrong. The debate is not as simply dichotomized as it seems. The disputes about hate speech and, more generally, multiculturalism actually illustrate the slippages and incoherencies in the dichotomy. The too easy polarization misses the extent to which the difference and dissent values co-exist and compete within each wing of the multiculturalism debate.

Both sides use the expression/equality dichotomy as shorthand for disputes on a series of component issues. Those component issues give the equality-expression binary its political punch. In fact, however, these component issues exist quite independently of their framing as expression or dissent versus equality or difference. They are most profitably analyzed as they exist within each of the doctrinal poles of debate. Three such component questions are central to the legal discourse, and they recur throughout analysis of the dichotomy and any exploration of alternative concepts.

### A. *Socially Constructed Selves*

A central tension underlying the equality-expression face-off in the multiculturalism debates is whether individual autonomy should continue to function

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RUTGERS L. REV. 287 (1990); Thomas C. Grey, *Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 1991; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) [hereinafter Post, *Racist Speech*]; Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); and Nadine R. Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

<sup>222</sup> "At the center of the [hate speech] controversy is a tension between the constitutional values of free speech and equality." Lawrence, *supra* note 221, at 434. See also Calvin R. Massey, *Hate Speech, Cultural Diversity and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 104-05 (1992) ("Maintaining simultaneous fidelity to both of those principles [free expression and the equal dignity of persons] has never been easy, but it has become vastly more difficult" as the controversy over hate speech has grown.); Post, *Racist Speech*, *supra* note 221, at 271 ("[W]riting this essay has been difficult and painful. I am committed both to principles of freedom of expression and to the fight against racism. The topic under consideration has forced me to set one aspiration against the other . . ."); Redish & Lippman, *supra* note 219.

One who has questioned the inevitability of the dichotomy is John A. Powell. John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97 (1998); John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9 (1997).

as the lodestar for deploying the rule-setting power of law. Traditional liberals have denounced the risk to freedom posed by legal principles that give greater weight to group claims than to those of individuals. This argument is often conducted in terms of the traditional liberal defense of expression that seeks to devalue certain groups, such as hate speech, versus the multiculturalist willingness to silence that speech to better protect the group. The alignment of individual autonomy with expressive interests and group rights with equality interests is both misleading and superficial, however.

It is misleading because it fails to acknowledge the extent to which both sides in the debate invoke each other's arguments. From Brandeis through Alexander Meiklejohn to the present, one major justification for the primacy of the expression right has been the collective interest in fostering the kind of self-actualization that produces good citizens. Individual autonomy is necessary, in this argument, for the integrity of group self-governance. Equality advocates, on the other hand, invoke not only group claims and rights, but also argue individual self-actualization as a justification for group-based equality. Underlying much of the multicultural rhetoric is a reliance on the integrity of personhood, a self that is not deformed by stigma and subordination. Depending on one's perspective, either the privileging of individualism collapses back into the concept of social needs, or the invocation of inclusion and full participation collapses back into individualism.

Egalitarians attack liberals for a double standard: for celebrating individualism but, contradictory to their own First Amendment philosophy, undermining the collective space which is its goal when the issue is the harmful effects of bias on the scope of public culture.

Liberals, on the other hand, respond that privileging the power of any unit larger than the individual invariably either risks subordinating the interests of those most marginal groups who cannot even muster equality claims that society recognizes as plausible or merely declares by fiat which previously less powerful groups shall now be deferred to, producing a new hierarchy that is doomed to repeat the problems of the current one.

Neither perpetuating nor renouncing the trope of individualism will untie this knot, however, because the nub of the dispute lies at a deeper level. I have argued that our most cherished doctrinal charter of individual liberty in fact grew from group action intended to assert a claim of what was undeniably group rights. At a deeper level, the debate elicits questions about the extent to which individual autonomy is more than a myth. Neither the accepted understanding that expression is a communally-shared value nor the claim that speech is always and intrinsically a social product cuts as deeply into traditional liberal assumptions as the argument that the self is a socially-generated function.

This claim raises the stakes for how the law values autonomy vis-a-vis participation because it strikes at the heart of the premises built on a foundational primacy of the individual. We assume that democracy is shaped by the cumulative wills of free agents, and that protection of individual self-determination is a necessary

precondition for collective self-determination. The postmodern notion that flips this assumption on its head and asserts that the self is largely created by culture threatens to upend any liberal conception of rights.

Indeed, absolutist denial of selfhood cannot be reconciled with the concept of persons as rights holders upon which our law depends. A more modulated critique, however, that seeks to recalibrate the balance between individual autonomy and social goods, animates much of the multiculturalism debates.

The work of Robert Post exemplifies the challenge posed to traditional First Amendment jurisprudence by culture-centered, rather than individual-centered, analysis. Post's analysis does not lead him to take sides in the hate speech debates; instead he calls for a contextualized analysis of particular situations.<sup>223</sup> However, he sees First Amendment functions in profoundly social terms, with "self-determination requir[ing] the antecedent formation of a 'self' through socialization into the particularity of a given community life."<sup>224</sup> In his view, First Amendment protections should focus explicitly on the value of the social practices that give acts of expression their meaning and that are made possible by speech. "Doctrine ought to identify discrete forms of social order that are imbued with constitutional value, and it ought to clarify and safeguard the ways in which speech facilitates that constitutional value."<sup>225</sup>

Thus, although he is ambivalent about hate speech, Post has criticized the Court's ruling in *Hustler Magazine v. Falwell*<sup>226</sup> for barring enforcement of common law torts, such as intentional infliction of emotional distress, on the rationale of preserving free expression.<sup>227</sup> Repression of speech which is assaultive of the integrity of one's personality, in his view, serves the important function of facilitating the kind of public civility necessary for rational deliberation. Characterizing those civility rules as the glue of community life and community life as the source of individual personality, Post argued that laws protecting that social, interactive process merited enforcement.<sup>228</sup> As his call for "reconciling individual and collective autonomy through the medium of public discourse"<sup>229</sup> demonstrates, an argument for recalibration of the balance does not answer the question of which side in the multiculturalism debates wins. But it does better reveal the depth and true

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<sup>223</sup> Post, *Racist Speech*, *supra* note 221, at 325–27.

<sup>224</sup> *Id.* at 326.

<sup>225</sup> Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276–77 (1995) [hereinafter Post, *Recuperating*].

<sup>226</sup> 485 U.S. 46 (1988).

<sup>227</sup> Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 616–26 (1990).

<sup>228</sup> *Id.* at 616–18, 633–38.

<sup>229</sup> Post, *Recuperating*, *supra* note 225, at 1275.

configuration of one of its tensions than does the framing of individual versus group rights.

### B. *Assimilation and Particularity*

The second component issue submerged in the dichotomy is the social value of assimilation into a single, hybrid, American culture versus that of celebrating difference and particularity. Assimilation versus difference became a master metaphor for the debate and for the historical moment of the "culture wars." Most provocatively stated, the universalist view is that "we are just one race here. It is American."<sup>230</sup>

Gary Peller has posited that the history of integration in the 1950s and 1960s fueled a liberal, universalist understanding of race.<sup>231</sup> During that period, integrationism became the political project of dominant social elites. Under that world view, neutrality and color blindness were associated with rationality and truth. The belief that race should make a difference in social relations was associated with particularity or race consciousness, as expressed both by white segregationists and black nationalists. Peller argues that one price paid for ending American apartheid was the rejection of both manifestations of particularity as equally wrongheaded, albeit headed in opposite directions.<sup>232</sup> A deviation in any direction from a universal norm of objectivity signaled racism.

The privileging of integration fits comfortably into the traditional logic of First Amendment debates, assuming that all disputants in an ideological contest share a common framework of references that amounts to a common cultural vocabulary. Otherwise, the absence of that lingua franca leads to what Robert Bork called "a chaos of cultures,"<sup>233</sup> with each group "urged to become or remain a separate tribe."<sup>234</sup> In this way, the liberal individualism that undergirds the First Amendment perspective is linked to assimilation in a parallel framework.

Multiculturalists insist that preserving and valuing different norms and standards is essential for full democracy. They reject what postmodernists term the "normalizing discourse" of universalist themes and majoritarian understandings in favor of preserving cultural zones of resistance anchored in counter hegemonic communities—of color, of gender, of language, of sexuality.

However, the assimilation versus difference dynamic does not, upon closer inspection, align well with the expression-equality dichotomy. Assimilation and universality are linked with First Amendment liberalism in the multiculturalism debates, but the First Amendment's privileging of anti-conventional dissent can be

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<sup>230</sup> *Adarand v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

<sup>231</sup> Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

<sup>232</sup> *Id.*

<sup>233</sup> ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 298 (1996).

<sup>234</sup> *Id.* at 299.

equally well linked to the impulse toward separatism. This is most evident in a number of the Religion Clause cases such as *Wisconsin v. Yoder*,<sup>235</sup> where the Amish were allowed to remove their high-school age children from public schools in order to sustain their insular faith community.

Consider the anti-essentialist critique of identity politics. It argues that equality claims founded on the assumption that woman, for example, is an unproblematic, unitary subject inevitably reinscribes racist and other power structures because the woman posited as the norm is invariably White.<sup>236</sup> This critique leads to increasingly specific claims of identity differentiated from any concept of the norm, of, for example, “the” African-American woman. “The source of gender and racial essentialism (and all other essentialisms, for the list of categories could be infinitely multiplied) is the second voice, the voice that claims to speak for all.”<sup>237</sup>

Critical theorists have framed the anti-essentialist critique, as based on equality, as an argument for a fundamental rethinking of the norms from which identity claims take radical exception. The same critique, however, could as easily be framed as one of dissent from “the second voice.” The recognition that anti-essentialists seek is not merely one of presence but, at least as importantly, of a distinctive point-of-viewing.

Additionally, the dichotomy misstates the extent to which the egalitarians attack particularity. A central part of their critique is that neutrality masks the issue of dominance and power. First Amendment civil libertarians contend, in varying degrees, that state power must and, more fundamentally, can be neutral. Most analysis of multiculturalism turned on its demand for more voices to be heard and, more problematic, for new voices to replace old ones in situations of scarcity (e.g., the reading list for freshman English). Liberals would argue that replacing White with African-American authors is reverse racism, or perhaps not even reverse. Multiculturalists would argue that it is not racism at all.

But multiculturalists also attacked the perceived norm or universal as itself particularized—as raced or gendered, for example—and thus not neutral but biased. As Martha Minow stated it, “impartiality is the guise that partiality takes to seal bias against exposure.”<sup>238</sup> The logic of that argument is that particularization is harmful when misperceived as universal and aggravated by imbalances of power. In effect, multiculturalists made a qualified argument that racial or gender specificity is a problem, albeit not the primary one.

The central paradox of the universal versus particularist subdivision of the multiculturalism debates is the mutual dependency of the two antagonistic

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<sup>235</sup> 406 U.S. 205 (1972).

<sup>236</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>237</sup> *Id.* at 588.

<sup>238</sup> MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 376 (1990).



positions.<sup>239</sup> Individual rights claims deployed along various doctrinal paths depend on the classificatory power of the modern liberal state, a power which generates regulatory identities. And identity formations depend on the universalist ideal, the “second voice,” for their very existence as recognizable difference.

### C. *Orthodoxy and Exclusion*

Finally, the dichotomy misses the synergistic quality of its two seemingly opposed political projects. The prime aspiration of the liberal individualists is to achieve state neutrality as to viewpoint, a pluralism that fosters all points of view equally and uncritically. It is a world view in which the worst evil is orthodoxy and its prevention is the great “fixed star” of American constitutionalism.<sup>240</sup>

For the egalitarians, the project is largely remedial, an attempt in the spirit of the Reconstruction Amendments to repair entrenched inequalities by recalibrating what constitutes neutrality. In that project, curbing some expression is a legitimate means of making space for other speakers, of countering subordination. For multiculturalists, the great evil is exclusion.

Orthodoxy and exclusion are not, and need not be, trade-offs, however. Orthodoxy and exclusion feed off and breed each other. One of the most quoted First Amendment aphorisms used to rebut hate speech, for example, is that “the best answer to bad speech is more speech.”<sup>241</sup> To a large extent, however, multiculturalism *is* “more speech.” The free speech arguments that are mustered in opposition signal that the political valence of the First Amendment has drifted from that of a progressive intervention against institutions of dominance into often a defense of such institutions. The politics of identity and equality represent a kind of insubordination against what the cultural meaning of free speech has become.

By taking the bait of the First Amendment’s trope of individualism, multiculturalists lose the power and bite of dissent. The problem with identity politics is not its fragmentation of an illusory neutrality and American-ness. It is how to liberate identity politics from itself—from its own tendencies to dead-end in a seemingly endless specification process producing ever more particular identity claims. Recognizing identity and dissent as mutually constitutive may help.

In sum, the multiculturalism debate comprises a series of component debates over the viability of previously accepted premises for liberal democracy—a modernist claim to selfhood, the master metaphor of assimilation, and the ideal of a neutral state. These constitute a dispute that is real but far less neat than both sides describe.

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<sup>239</sup> Wendy Brown, *Wounded Attachments: Late Modern Oppositional Political Formations*, in *THE IDENTITY IN QUESTION* 205 (John Rajchman ed., 1995).

<sup>240</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>241</sup> The aphorism is based on Justice Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927).

## V. TOWARD ANTI-ORTHODOXY AND INCLUSION

Not only are expression and equality too mutually embedded to be disaggregated in a way that makes cultural sense, but they represent two ways of addressing the same evil of oppressive discursive regimes. Censorship and exclusion perform the same ultimate function: truncation of the richness of the public sphere. One should not be more or less vulnerable to challenge than the other.

### A. *Multiple Meanings*

For some groups and identities, the amount of animus and stigma directed toward them is such that they suffer widespread discrimination. Recognizing them is not difficult. The patterns of discrimination are reflective of deeper patterns of social stratification. Often such patterns have led to protective measures from courts or legislatures or both.

Equality-based interventions occur when those groups or identities seek inclusion or equal treatment and are resisted. Their efforts to attain inclusion or equality is intrinsically a move against orthodoxy because they challenge the patterns of stratification and the ideology of dominance that undergirds those patterns.

When equality law is conceptualized as protection against idiosyncratic prejudice rather than against ideologies of dominance, it is weakened at the core. Prejudice operates as "a lens that distorts reality"<sup>242</sup> and causes misperceptions of the worth and ability of individuals with certain characteristics. Ideologies of dominance, on the other hand, are neither arbitrary nor irrational, but rather are integral parts of systems of power. Those systems may also be blind to individual worth, but the interests that some persons and groups have in maintaining lines of stratification are quite rational.

A de-ideologized concept of equality works doctrinally because of the dichotomy between expression and equality. Once law categorizes systems of dominance as ideological, they can acquire First Amendment protection, at least in the private sector. Once law categorizes claims for inclusion or equality as ideological, they may lose shelter under the Equal Protection Clause.<sup>243</sup>

Seeking to resolve this problem in an overall scheme of both inclusion and anti-orthodoxy does not mean that anti-equality voices lose their First Amendment protection. If nothing else, such voices do function as dissidents from a legal mandate if nothing else, even if the equality law is a minority or counter-majoritarian view in the culture at large.

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<sup>242</sup> ELY, *supra* note 77, at 153.

<sup>243</sup> For a more extensive argument as to the ramifications of this paradox throughout constitutional law, see Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (1999).

But an equality mandate is not “the new orthodoxy.”<sup>244</sup> The concept of anti-racism, for example, may acquire some measure of the power of the state in its support in the form of a civil rights law, and racists have every right to dissent from that concept and to seek the instantiation of openly racist policies. As a result, they may be situational dissenters, opposing the heavier hand of the state, but their views are not anti-orthodoxy in any sense that incorporates the history and dynamics of race in the United States. We need not blind ourselves to a social reality that continues to reverberate throughout every aspect of American life in order to respect a right to situational dissent.

Enforcement of equality law does need to be sufficiently narrowly tailored to preserve the rights of those who resist it on ideological grounds. Equality resisters should not simply be steamrolled out of any capacity to express their resistance. But, when one assesses the interests of the state in enforcing equality, one should include anti-orthodoxy in the balance on the side of equality, not on the side of subordination. That is the profound difference that civil rights laws have made to the concept of anti-orthodoxy.

## B. *Harassment Law*

Applying that approach offers a way to explain why most sexual harassment law is consistent with *R.A.V.*, without relying on the outmoded notion of fighting words or incidental restrictions, as Justice Scalia did in *R.A.V.*<sup>245</sup>

Hostile environment harassment may consist solely of speech. The prohibition of harassing speech is not limited to face-to-face situations; it is judged by “the totality of the circumstance” and “context.”<sup>246</sup> What justifies repressing that speech is its function as a targeted method of exclusion and subordination.<sup>247</sup> The fact that it also

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<sup>244</sup> See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573 (1995) (quotes used for emphasis).

<sup>245</sup> See *supra* notes 189–94 and accompanying text. Scalia’s analysis ran as follows:

[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

*R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992) (citations omitted).

<sup>246</sup> 29 C.F.R. § 1604.11 (1999).

<sup>247</sup> J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2307–08 (1999). See also Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992).

expresses a viewpoint does not inoculate it from coverage under equality law. This rationale engages more forthrightly with the purposes of sexual harassment law than other justificatory grounds that have been proposed. The fact that workers are a captive audience and the assertion that speech in the workplace is subject to greater regulation than speech on the street may be related to the capacity of harassing speech to enforce exclusion.<sup>248</sup> However, those rationales avoid, perhaps intentionally so, the most difficult aspects of the conflict in rights between women workers and harassers by negating the viewpoint-rich content of much harassing speech.

I would acknowledge that harassers are often expressing a viewpoint, and require that civil rights protections be narrowly tailored to enforce equality without gratuitously trampling speech.<sup>249</sup> In my view, the current test for sanctioning harassment largely achieves that goal. The Court has held that Title VII is violated “when the workplace is permeated with ‘discriminatory intimidation, ridicule and insult,’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”<sup>250</sup> This standard draws the line based on how harassing speech operates in the particular circumstances at issue, not based on generic harm, fighting words, obscenity, or other categories of speech that lie outside the shelter of the First Amendment.

Some proposals to cut back on sexual harassment law would limit it to cover only face-to-face harassment.<sup>251</sup> That approach has the advantage of drawing a bright line, but the disadvantage of missing many of the practices that are most exclusionary, and suggesting a far too easy gambit for restricting equality by making the harassment anonymous.

Another proposal by Cynthia Estlund argues that a new subcategory of verbal workplace harassment should be carved out from First Amendment protection.<sup>252</sup> Estlund argues that the totality of the characteristics of the workplace mark it as “a satellite domain of public discourse,” justifying its own status as an exception.<sup>253</sup> Although Estlund’s approach has the appeal of leapfrogging over attempts to ground

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<sup>248</sup> Balkin, *supra* note 247, at 2311–14. *See also* Fallon, *supra* note 213, at 18–19; Aguilar v. Avis Rent a Car Sys., Inc., 980 P.2d 846, 869–73 (Cal. 1999) (Werdegar, J., concurring) (holding an injunction preventing an employer from using any derogatory racial or ethnic epithets is not a prior restraint of speech), *cert. denied*, 129 S.Ct. 2029 (2000).

<sup>249</sup> *See* Strossen, *supra* note 247, at 763, 777; *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

<sup>250</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Banks, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986) (citations omitted)). As Richard Fallon notes, the Court’s decision in *Harris* never mentions the First Amendment. Fallon, *supra* note 198, at 1.

<sup>251</sup> *See generally* Volokh, *supra* note 213; Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990).

<sup>252</sup> Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).

<sup>253</sup> *Id.* at 718–41.

harassment law in the multiple other First Amendment exceptions, I am disinclined to generate even more categories of unprotected speech.

I do not intend, however, that all speech that may be experienced as offensive to women should be prohibited as harassment. The sexualized nature of speech, as distinct from its genuine exclusionary power, may influence some courts to range too broadly into problematic but protected expression.<sup>254</sup> Generic hate speech—pornography which is misogynist—or off-color, tasteless remarks may be too indirect, ambiguous or dismissible to operate as effective methods of exclusion. The expressive viewpoint functions of such speech may outweigh their power to damage the working conditions of those seeking inclusion. For the state to suppress speech in those circumstances strays too far beyond the bounds of narrowly tailored enforcement mechanisms.

The rationale that I endorse preserves the rights of speakers without having to invest the anti-equality advocates with the undeserved mantle of victims of a “new orthodoxy.” Like the African-American family in *R.A.V.*, it is women seeking to integrate enclaves of masculinist supremacy who are the forces of genuine anti-orthodoxy.

## VI. CONCLUSION

The “preferred position” of the First Amendment in our Constitutional hierarchy is not innocent or foreordained. It is a product of a particular history, that of social movements in the first half of the twentieth century, which itself has been shaped and reshaped by the ideology of individualism. Resistance to recognizing the social nature of expression has fostered a hyper-individualist philosophy of speech.

Similarly, resistance to recognizing animus systematized along lines of social stratification rather than personal bias has limited equal protection analysis. The focus on irrational prejudice made the immutability concept appealing—to penalize persons for that over which they had no control was nonsensical as well as unfair. Equal protection concepts became centered on groups with frozen lines of definition. Together these dynamics exaggerated the distinctions between expression and equality.

When one rejects the platitudes and interrogates the expression-equality dichotomy, however, multiple complexities arise. The dichotomy begins to seem increasingly artificial—an unworkable paradigm grafted onto a complicated mix of political dynamics that do not fall into the neat boxes it prescribes.

My goal in this article has been to open a space for the emergence of counter-meanings. If we re-situate discourses of knowledge and examine the reasons behind the reification of both expression and equality, we can uncover the systems of power that they perpetuate. Dichotomy is not the only available model. We can instead

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<sup>254</sup> See Schultz, *supra* note 211, at 1689.

construct one that reflects the complexity and fluidity of these centrally important principles.